Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
TERM OCTOBER 1994

ROBERT C. DOWNER, PETITIONER

VS.

ELDON HANNEMAN AND PATRICIA
HANNEMAN, HUSBAND AND WIFE
AND
MAXINE V. SWENSON, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED

Upon consideration of the following 3 events;

(1) In 1965 petitioner resurveyed patented land as directed by government Manual of Surveying Instructions, 1947, Sec. 359 and 562; and,

(2) In 1988 Interior Board of Land Appeals, in IBLA 86-45 (1988) page 1, adopted "substantial evidence" standard for resurveys,

(3) In 1994, the Supreme Court of the State of Nevada, in Case No. 23434, on page 13, decided that petitioner's 1965 resurvey was negligent, citing the 1988 "substantial evidence" standard;

QUESTION. Has petitioner been denied due process of law by the Court's judicial error of law, and of fact, by applying a 1988 standard to a 1965 survey to decide that it was performed negligently?

QUESTION. Has petitioner been deprived of due process by court's use of the "substantial evidence" standard, (I.B.L.A. 86-45, 1988, page 1), which conflicts with the U.S. Supreme Court decision in Cragin V. Powell, (128 U.S. 691, 696.) and with 1947 Manual, Secs. 359 and 562, to find petitioner's 1965 survey negligent?

QUESTION. Should this conflict of federal standards be settled by Supreme Court of the United States?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings.

ERRATA - Page ii, first paragraph should read "Findings", Page 18, line 22.

The QUESTION arises in the District Court, Case No. 15029. Judge Fondi. "Findings..." Page 18, line 1. "Downer argued that his actions must be evaluated on the basis of the information available to him in 1965."

However, Judge Fondi decides Downer's "negligence" based on "substantial evidence" identification standard as set forth in IBLA 86-45 1988.

QUESTION again arose in Nevada Supreme Court Case 23434, in Downer's Opening Brief, Page 16, line 3. "The Board then found against Downer's survey; not based on any negligence of Downer but because they concluded there was "substantial evidence" to support the position of the BLM..."

Downer's reply Brief. Page 22, line 24.

"Nowhere in the 1947 Manual is the substantial evidence test for monument identification even mentioned...Downer cannot be held negligent because of the imposition, years later, of that standard."

Court did not address above arguments.

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App. G Findings and Conclusions, Interior Board of Land Appeals. 84-762.

Appendix appears in separate binding.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada, was filed on March 30, 1994.

This Court's jurisdiction is invoked under Title 28, U.S.C. Sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth below.

Amendment XIV, Sec. 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

AUTHORITIES CITED

"It is a well settled principle that when lands are granted according to an official survey of such lands, the plat itself, with all of its notes, lines, descriptions and landmarks, become as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself." Cragin V. Powell (128 U.S. 691, 696) (See 1947 Manual, Sec. 562)

"It is a matter of utmost importance to determine where an identified call of the original field notes shall operate to control for both latitude and departure, or for either coordinate by itself, and finally as to the necessity for applying the rules of proportionate measurement where the distance between the identified points is considerable." BLM "Manual of Surveying Instructions, 1947. Section 359.)

"...the validity of a retroactive statute is determined by whether it impairs contractual obligations, violates due process, disturbs vested rights, or conflicts with any other constitutional provision or fundamental right." 16A C.J.S., Par. 416, Page 96.

"Presumptive invalidity." ..."laws that attempt retroactively to create liability in a relation as to which no liability previously had attached, although not necessarily unconstitutional, are generally so arbitrary, harsh and oppressive as to be regarded presumptively invalid."
N.Y. - Application of Bailey, Sec. 7N, Y.S. 2nd 746. 265 App. Div. 758 Affirmed 50 N.E. 2nd 653, 291 N.Y. 534.

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA
TERM, 1994

ROBERT C. DOWNER
PETITIONER
VS.
ELDON HANNEMAN
AND
PATRICIA HANNEMAN,
AND
MAXINE V. SWENSON
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, Robert C. Downer, respectfully prays that writ of certiorari issue to review the judgement and opinion of the Supreme Court of the State of Nevada, affirming, in part, the judgement of the Ninth Judicial District of the State of Nevada.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Nevada, Case No. 23434, appears in Appendix A of this Petition.

The opinion of the Ninth Judicial District Court of the State of Nevada, in and for Douglas County, appears in Appendix B to this Petition. Case No. 15029, Dept. 1.

The decision of Interior Board of Land Appeals 86-45 (1988) appears in App. E to this Petition.

The decision of Interior Board of Land Appeals 86-45 (1987) appears in App. F to this Petition.

Findings and Conclusions, IBLA 84-762 (1985) appears in Appendix G of this Petition.

STATEMENT OF THE CASE

In 1965 Stoddard Jacobsen employed Petitioner, a licensed land surveyor, to divide a portion of his land into large lots. The property was part of a patented homestead granted to William Carter in 1882. The land is mountainous and forested.

Petitioner first obtained, from the BLM office in Reno, copies of the field notes and plat of all official government surveys in the area, beginning in 1881. The current "Manual of Surveying Instructions, 1947", was Petitioner's authority for resurvey methodology.

Jacobsen's land was bordered on the north by the north line of Sec. 9, T.11N., R.21E., Mt. Diablo Base and Meridian. It was bordered on the west by the curving alignment of Highway 395. Only one original section corner, for which the evidence was "fully conclusive", was found in a distance of over two miles. Therefore the methodology in Sections 353 to 359 and 562 were used for retracement of the north boundary, using calls and distances in 1881 field notes. Two monuments were found but rejected due to drastic deviation from record. By contrast, Petitioner's boundary agrees closely with record, and conforms with the 1947 Manual.

Petitioner rejected these monuments which were "not fully conclusive", and notified the Highway Dept. of the situation. Petitioner then set property corners on the true line and filed his map with the County Recorder.

About ten years later Hanneman, the Respondent in this case, became owner of a lot bordering on the north boundary.

About 1982 a mining company surveyor adopted the corners which Petitioner had rejected, and informed Hanneman that his building and several acres had been cut off.

The BLM survey crew, called in to investigate the conflict, also accepted the corners which Petitioner had rejected. Petitioner filed a protest with BLM. Protest was dismissed by BLM. Petitioner appealed to Interior Board of Land Appeals. IBLA, in 85 IBLA 335, 342 (1985) "concluded that appellant had raised a "substantial question of fact whether the BLM retracement of the boundary in dispute was accurate." A hearing by an Administrative Law Judge was deemed appropriate.

Judge L.K. Luoma conducted hearings and a field inspection. He concluded, "there seem to be so many deviations from the original calls and distances in the BLM resurvey as to cast

doubts on its accuracy" and remands case to BLM for a resurvey.

Both Petitioner and BLM appeal from Judge Luoma's decision for lack of specificity on how to conduct a resurvey. An IBLA 3-judge panel rules on the appeals. Their decision on May 8, 1987 affirms Judge Luoma's decision, and states that "Appellant's evidence generally supports the accuracy of the 1881 survey. The evidence of discrepancies presented by BLM almost makes a case for a fraudulent survey." And "the case is remanded to BLM for further action consistent herewith."

BLM petitions for reconsideration of Board's decision requiring resurvey. In IBLA 86-45, on June 8, 1988, the Board grants the petition and announces "The proper standard for the BLM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence, 'substantial evidence' is such relevant evidence as a reasonable man might accept as adequate to support a conclusion." They then accepted the corners which Petitioner had rejected.

Appeals to Federal District Court, Nevada and to Ninth District Court of Appeals were dismissed for lack of standing, because Petitioner was not an owner. There was no dis-

cussion of the merits of the survey case.

In Hanneman vs. Swenson, Downer and Jacobsen, in the Ninth District Court of the State of Nevada, in and for the County of Douglas, Judge Fondi, March 27, 1992. Findings, Conclusion and Judgement. Statement on page 7, line 14. "The Board held that the proper standard for the BLM to apply to establish the monuments for use in a resurvey was to consider a corner existent (or found) if such a conclusion was supported by substantial evidence. The Board then applied the substantial evidence standard to the BLM survey evidence and decided that the BLM had established all the survey monuments." Obviously this new, less demanding, standard changed the rules, to enable acceptance of BLM's survey and rejection of Downer's.

In the present case No. 23434, being appealed by Petitioner from the Supreme Court of the State of Nevada, the Court states, on page 13, "We conclude that substantial evidence supports the District Court's determination that Downer failed to meet the requisite standard of care. Obviously, the new rules were again applied to accept BLM's survey and to reject Downer's 1965 survey, even though it is in compliance with the more demanding requirements of the 1947 "Manual of Surveying Instructions".

From the preceding series of proceedings in this case the chronology of events is clear:

1965 - Resurvey of north boundary by Petitioner. Due to patented land, survey is controlled by Secs. 359 and 562 of 1947 Manual.

1988 - In IBLA 86-45 (1988) Board establishes "substantial evidence" as proper standard. This standard is not mentioned in the 1947 Manual which Petitioner was required to use in 1965.

1992 - In the Ninth Judicial District Court of the State of Nevada, in and for Douglas County. Judge Fondi decision on page 7. "The Board held that the proper standard was... "substantial evidence. The Board then applied the substantial evidence standard to the BLM evidence and decided that the BLM had established all the survey monuments..." Obviously, this ambiguous standard was not available to Petitioner in 1965.

1994 - In the Supreme Court of the State of Nevada, opinion filed March 30, 1994. Statement on page 13. "We conclude that substantial evidence supports the District Court's determination that Downer failed to meet the requisite standard of care..."

Petitioner's survey, in 1965, complied with the 1947 Manual, which does not contain the "substantial evidence" standard, but, instead, establishes strict rules for retracement of boundaries. Obviously, the Court is imposing the 1988 "standards" on Petitioner's 1965 survey to decide that it is negligent.

Petitioner believes that retroactive application of the 1988 standard on the 1965 survey, by the Court, to discredit his 1965 survey methods is contrary to proper legal procedures, and deprives him of due process of law, thus violating the Fourteenth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari here to rule that Petitioner's due process rights have been denied, as described, and to resolve the conflict between IBLA's 1988 "substantial evidence" standard and the standard for patented land boundary retracement described in the 1947 Manual, Sections 353-359, and 562, and also with the 1973 Manual, Section 5-9, which conflict has been so costly in time and money and stress, to all parties involved.

CONCLUSION

For the reasons set forth above, the writ of certiorari should issue to review the judgement and opinion of the Supreme Court of the State of Nevada in this matter.

Date: June 10, 1994

Robert C. Downer

Respectfully submitted

Robert C. Downer, pro se

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APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
TERM OCTOBER 1994

ROBERT C. DOWNER, PETITIONER

VS.

ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE
AND
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133pp

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE,	)	No. 23434
Appellants,	)	
v.	)	
ROBERT C. DOWNER, MAXINE V. SWENSON, AND STODDARD JACOBSEN,	)	
Respondents.	)	
ROBERT C. DOWNER,	}	
Cross-Appellant	}	
v.	}	
ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE; ROBERT G. DOWNER; AND STODDARD JACOBSEN,	}	
Cross-Respondents.	}	

Appeal and cross-appeals from money judgment entered pursuant to bench trial. Ninth Judicial District Court, Douglas County; Michael E. Fondi, Judge.

Affirmed in part; reversed and remanded in part.

Jack McAuliffe, Reno
for Eldon and Patricia Hanneman.

Jon M. Yaple,
Carson City,
for Robert C. Downer.

Aebi & McCarthy,
Carson City,
for Maxine V. Swenson.

Allison, MacKenzie, Hartman, Soumbeniotis & Russell and Mike Pavlakis, Carson City,
for Stoddard Jacobsen.

O P I N I O N

PER CURIAM:

FACTS

This action results from a negligently performed survey and subsequent conveyance of the inaccurately described real property. The subject property is part of a tract of land located in the Pinenut Range of Douglas County. Respondent Stoddard Jacobsen acquired the tract in 1950. In 1965, Jacobsen retained respondent, Robert Downer, to prepare a survey map and record it in the official records of Douglas County. Downer prepared the survey with the understanding that the tract would be subdivided into several parcels. Prior to commencing the survey, Downer obtained plats,

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1 A "corner" is a point determined by the surveying process, which sets or establishes the boundaries of a subdivision. A "monument" is a physical object that marks the corner point. Types of monuments include a marked wooden stake or post, a marked stone, an iron post with an inscribed cap, a marked tree, or a rock with an "x" at the exact corner point. "Accessories" are part of corner monuments and consist of bearing trees or objects, mounds of stone and pits dug in the sod or soil, that aid in identifying the corner position. Bureau of Land Management, U.S. Dept. of Interior, Technical Bulletin 6, Manual of Instructions for the Survey of the Public Lands of the United States, Ch. V, **S** 5-4, p. 129. "Field notes" are the written record of the survey that "identifies and describes the lines and corners of the survey and the procedures by which they were established." ID. at Ch. VIII, **S** 8.1, p. 183.

The property at issue ("the property") is shown on the Downer map as consisting of 5.88 acres; it is one of the parcels created by Jacobsen's subdivision. In late 1966 or early 1967, Jacobsen conveyed the property to Frank Frazier. However, the conveyance from Jacobsen to Frazier was never officially memorialized because Frazier was illiterate. In 1971, Frazier sold the property to respondent Maxine Swenson for $9,500.00. At Frazier's request, Jacobsen deeded the property directly to Swenson by a grant, bargain and sale deed.

In 1976, Swenson sold the property to the appellants, Eldon and Patricia Hanneman, for $35,000.00.[2] The Hannemans gave Swenson $7,500.00 and executed a promissory note for $27,5000.00, to be paid in monthly installments of $200.00. Both Swenson and the Hannemans believed that the property consisted of 5.88 acres, upon which was situated a dilapidated and uninhabitable house. The well on the property was inoperative, the water pipes were broken, the access road was nearly inaccessible, the flat roof on the old house leaked, and the kitchen and bathroom were in shambles.

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2 The Hannemans were divorced in 1976 and unless otherwise stated, "Hanneman" refers to Eldon Hanneman.

Hanneman, a carpenter by trade, repaired the well, water pipes, and road, constructed a gable roof, installed custom-built kitchen cabinets, and made sundry repairs to the kitchen and bathroom.. He also installed new siding, two windows, a sliding window door, a wood stove, light fixtures, and a concrete patio.

In 1981, Hanneman learned that a private survey performed by Veta Grande Mines revealed that over four acres of the property (including the house and well) belonged to the federal government. Hanneman contacted Swenson and informed her of the defective survey performed by Downer. Swenson defended Downer's survey, but rejected Hanneman's offer to continue paying for the property on condition that Swenson agree to reimburse him if Downer's survey proved to be incorrect.

Hanneman stopped making payments in April of 1982.[3] Hanneman continued to occupy the premises on a sporadic basis until the autumn of 1985, when he abandoned the property entirely. In an effort to mitigate his damages, Hanneman removed the kitchen cabinets, bathroom vanity, light fixtures, wood stove, washer

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3 Hanneman initially deposited the monthly payments into a bank account; however, Hanneman withdrew the funds in 1988 and used them to purchase his current residence.

and dryer, and other items of personal property. In leaving the premises, Hanneman made no provision for protecting the property against vandalism or the elements. During trial, Odd Kjell "Kelly" Larsen, a carpenter called by Swenson, testified that it would cost over $12,000,00 to repair the damage caused by Hanneman's mitigation. Swenson eventually foreclosed upon the property and now owns the remaining 1.5 acres, which are narrow, steep and valued at $1,000.00.

The Hannemans filed the underlying action on July 31, 1984, in which they asserted claims against Swenson for misrepresentation, breach of the sales agreement, and breach of warranty of title. The Hannemans also complained against Jacobsen for negligence and breach of warranty of title, and alleged negligence against Downer. The action sought $120,000.00 in damages, consisting of the market value of the property on the date of the complaint, and attorney's fees.

Swenson counterclaimed against the Hannemans for breach of the promissory note. Swenson also filed cross-claims against Jacobsen and Downer seeking indemnification for breach of warranty of title and a negligent property survey, respectively. Finally, Jacobsen cross-claimed against Downer for indemnification based upon the negligent survey.

At the close of the Hannemans' case-in-chief, Jacobsen moved for an NRCP 41(b) dismissal on grounds that: (1) no privity existed between the Hannemans and Jacobsen or between Swenson and Jacobsen to support a breach of warranty of title claim; (2) Hannemans had failed to present evidence of Jacobsen's negligence; and (3) Jacobsen was not liable for Downer's negligence, if any, because Downer was an independent contractor. The district court granted the motion and dismissed Jacobsen from the case.

At the conclusion of the bench trial, the district court found that Swenson had contracted to sell the Hannemans 5.88 acres, and that Swenson's "inability to convey 5.88 acres was a breach of that contract due to a failure of consideration." Accordingly, the district court ordered Swenson to pay the Hannemans' out-of-pocket costs of $7,500.00. Swenson's liability to the Hannemans, however, was offset by her judgment against Downer for $7,500.00, with interest, which the district court specifically designated as the amount of "Swenson's liability to the Hannemans." The court found that Downer negligently performed the survey and ordered him to pay Swenson the unpaid balance of the promissory note from the Hannemans ($26,019.48 minus the $1,000 value of the remaining land). Finally, the district

court ordered Downer to pay attorney's fees to the Hannemans and to Swenson in the amount of $10,000.00 each, together with taxable costs.

DISCUSSION

The parties have raised several issues on appeal, only the following of which need resolution. The Hannemans imputes error to the district court's calculation of damages and its decision to dismiss Jacobsen's from the action. Swenson contends on cross-appeal that the court erred when it awarded damages to the Hannemans and failed to award Swenson damages for breach of contract. Finally, Downer insists that the district court erred in finding that he negligently performed the property survey and that his liability extends to subsequent purchasers of the affected property.

1. The Hannemans' Damages

Under the peculiar facts of this case, where Swenson purported to sell land which she mistakenly thought she owned, the district court correctly determined that the measure of the Hannemans' damages would be the amount of their "out-of-pocket" loss sustained by the Hannemans. See *Hornwood v. Smith's Food King* No. 1, 107 Nev. 80,84, 807 P.2d 208, 211 (1991). "Out-of-pocket" damages are measured by the difference between the amount paid by the aggrieved

party and the actual value of that which was received. *Randono v. Turk*, 86 Nev. 123, 130, 466 P. 2d 218, 223 (1970).

The Hannemans were dispossessed of property concerning which they had expended approximately $53,000.00.[4] Nevertheless, the district court limited the Hannemans' damages to $7,500.00, based on findings that the Hannemans had "failed to mitigate their damages" when they abandoned the property, and that the monthly mortgage payments were "completely offset by the reasonable rental value they received in occupying the property."

As a general rule, a party cannot recover damages for losses that a reasonable effort could have avoided. *Conner v. Southern Nevada Paving*, 103 Nev. 353, 355, 741 P.2d 800, 801 (1987). Our review of the record compels us to conclude that the district court clearly erred in finding that the Hannemans did not make a reasonable effort to mitigate their losses. The Hannemans removed virtually every item of value they

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4 In addition to the $7,500.00 down payment, the Hannemans paid Swenson $200.00 per month for approximately seven years, paid all taxes and insurance on the property for approximately eleven years, and purchased approximately $15,000.00 of building materials. Moreover, the Hannemans spent in excess of 2,000 hours improving the property. Hannemans conservatively valued his time at $10.00 per hour (he was then making between $15.00 and $18.00 per hour as a carpenter).

had placed on the property that was reasonably removable, and deducted the value thereof from their damages. As a result, the damages were mitigated by approximately $8,000.00. Given the circumstances of this case, the Hannemans could have done little else by way of mitigation.

Moreover, the district court's reliance upon Mr. Kjell's testimony was misplaced. The cost of restoring the house after the removal of items by the Hannemans represented an irrelevant consideration by Swenson since she had no ownership interest in the house from which the salvaged items had been taken. Hanneman's mitigative actions were beneficial to Swenson, and thus could not serve to further reduce Swenson's liability to the Hannemans.

Ordinarily, a fair rental value of the property would be a proper offset against payments in effectually applied to the purchase price of the property during its occupancy by the putative purchaser. In this instance, however, we have determined that such an offset is unwarranted. The Hannemans agreed to purchase property that included a house that was uninhabitable. They lived and worked on the property under conditions that were substantially less than desirable. The Hannemans not only made the road to the property usable, they

worked in excess of 2,000 hours in an effort to restore the premises to a habitable condition.

Although we have concluded that the Hannemans must receive as damages, an award for the time and materials expensed on the property, they will not be compensated for the period of time they had to endure living conditions that would not have induced them on to the property as renters. As buyers, they executed and made payments under a promissory note that was to result in their eventual ownership of 5.88 acres. The Hannemans relied upon their contract with Swenson and invested approximately $53,000.00 into what they thought would be their permanent home. There is no evidence in the record that would support the proposition that the Hannemans, as temporary renters, would have invested the same amount of time and money in the dilapidated and uninhabitable house at issue. Swenson's breach of the contract to convey 5.88 acres deprived the Hannemans of the opportunity to purchase and make habitable a home in which they would build an equity and enjoy the pride of ownership. Thus, we conclude that the district court clearly erred when it calculated the amount of the Hannemans' "out-of-pocket" damages. *Hermann Trust v. Varco-Pruden Buildings*, 105 Nev. 564, 566, 796 P. 2d 590, 591-92 (1990). The Hannemans are

entitled to the total amount of their investment, less the amount of their mitigation, together with interest from July 22, 1976. Therefore, we affirm Swenson's liability to the Hannemans, but direct the district court, upon remand, to recalculate the actual "out-of-pocket" damages suffered by the Hannemans. The amount of Swenson's $7,500.00 judgement against Downer must also be increased accordingly.

2. The Court's Decision to Dismiss Jacobsen

The Hannemans also contend that the district court erred in dismissing their action against Jacobsen. The contention is based upon Jacobsen's alleged vicarious liability for Downer's negligent survey under the doctrine of respondent superior. However, the doctrine does not apply where, as here, there is no relationship of "superior and subordinate, or, as it is generally expressed, of master and servant, in which the latter is subject to the control of the former. The responsibility is placed where the power exists." *Wells, Inc. v. Shoemake*, 64 Nev. 57, 64, 177 P. 2d 451, 455 (1947).

Downer was an independent contractor over whom Jacobsen exercised no control. Moreover, the precision and expertise with which surveyors must perform their work does not lend itself to control by laypersons. As one author noted:

> The surveyor is isolated in his calling and therein lies his responsibility . . Dishonesty in ordinary business life cannot long be hid and errors in account quickly come to light, but the false or faulty survey may pass unchallenged through the years, for few but a surveyor himself are qualified to judge it.

Walter G. Robillard and Lane J. Bouman, Clark on Surveying and Boundaries **S** 2.04, p. 30 (6th ed. 1992) (quoting A.C. Mulford, Boundaries and Landmarks 88, 89 (1912)). Additionally, NRS 625.330 (3) makes it unlawful for a surveyor to sign, stamp or seal any plat, map, report or document relating to land surveying which the surveyor himself did not prepare or for which he did not have "responsible charge of the work."

For the reasons stated above, we affirm the district court's finding that Downer acted as an independent contractor whose negligence cannot be imputed on Jacobsen. The action against Jacobsen was properly dismissed by the district court.

3. The Doctrine of Merger

Swenson challenges the district court's finding that her failure to convey 5.88 acres of land to the Hannemans was a breach of contract. Swenson argues that no legal or factual bases exist to support the

court's finding because no written contract for the sale of real property was introduced at trial. Swenson cites NRS 111.210, the statute of frauds respecting real property, to support her argument. That section provides in relevant part:

> 1. Every contract . . .for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

NRS 11.210 (1).

Swenson's reliance upon the foregoing statute is misplaced. The statute of frauds does not require the existence of a formal written contract to validate a loan sale transaction as long as some "note or memorandum" memorializing the transaction exists. See *Ray Motor Lodge v. Shartz*, 80 Nev. 114, 119, 390 P. 2d 42,44 (1964) (stating that separate writings considered together may satisfy statute of frauds even if neither is a sufficient memorandum in itself).

In the instant case, the district court concluded that the property description in the sales listing, "together with the surrounding circumstances of the land sale transaction, created a contract for

the sale of 5.88 acres." The legal description contained in the grant, bargain and sale deed refers to the Record of Survey which Downer filed in 1966 and which shows Parcel H (the subject parcel) as consisting of 5.88 acres. Additionally, the promissory note between Swenson and the Hannemans corroborates the sale of 5.88 acres. These writings, when considered together, satisfy the statute of frauds and evidence a contract for the sale of the subject property.

Swenson further argues that even if a contract did exist, its terms merged into the deed as matter of law. She contends, therefore, that under the doctrine of merger, any obligations she owed to the Hannemans derived solely from the deed. Since the property was conveyed to the Hannemans by grant, bargain and sale deed, Swenson claims to have warranted only that she had not conveyed the same real property to another and that the property was fee from encumbrances.[5] Swenson also insists that if, after

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5 NRS 111.170 states, in relevant part:

1. The words "grant, bargain and sell" in all conveyances made after December 2, 1861, in and by which any estate of inheritance or fee simple is to be passed, shall, unless restrained by express terms contained in such conveyances, be construed to be the following express covenants, and none other, on the part of the grantor, for himself and his heirs to the grantee, his heirs, and assigns:

> (a) That previous to the time of the execution of the conveyance the grantor has not conveyed the same real property, or any right, title, or interest therein, to any person other than the grantee.
>
> (b) That the real property is, at the time of the execution of the conveyance, free from encumbrances, done, made or suffered by the grantor, or any person claiming under him.

delivery and acceptance of a deed containing no express or implied warranties contained in the grant, bargain and sale deed, and that the Hannemans failed to plead either fraud or rescission in any event.

Swenson's argument is overly simplistic and fails to take into account the exceptions to which the doctrine of merger by deed is subject. The merger by deed doctrine has been described as follows:

> The general rule concerning a contract made to convey the property is that once a deed has been executed and delivered, the contract becomes merged into the deed, because it has accomplished the purpose for which it was created. The terms in the deed which follows the contract of sale become the sole memorial of the agreement which was once contained in the contract of sale. This does not mean that a contract no longer exists, just that the deed controls as the contract, rather than the terms of the prior sales contract.

Clark v. Cypress Shores Develop. Co., 516 So. 2d 622, 626 (Ala. 1987) (citations omitted; emphasis added). Stated differently, when the terms of the

deed cover the same subject matter as the earlier contract and the two are at variance, the deed controls. *Dobrusky v. Isbell*, 740 P. 2d 1325, 1326 (Utah 1987). Whether merger is applicable "depends upon the intention of the parties, and intention in 237, 239, 645 P.2d 967, 968 (1982) (stating that parties' intentions are determined from all the circumstances surrounding the transaction). Such cases is a question of fact to be determined by an examination of the instruments and from the facts and circumstances surrounding their execution." *Webb v. Graham*, 510 P.2d 1195, 1197 (Kan. 1973); see also *Szabo v. Superior Court*, 148 Cal. Rptr. 837, 840 (Cal. Ct. App. 1978) ("courts have looked to the intention of the parties to determine whether or not the deed was intended as the complete and final embodiment of the agreement"); *Kartheiser v. Hawkins*, 98 Nev. 237, 239, 645 P.2d 967, 968 (1982) (stating that parties' intentions are determined from all the circumstances surrounding the transaction).

Consonant with the foregoing authorities, Swenson's attempt to avoid her contractual obligations to the Hannemans by resort to the doctrine of merger by deed is without merit for several reasons. First, although a grant, bargain and sale deed contains only two express warranties, the Swenson deed

expressly conveyed to the Hannemans the land "shown on Parcel 'H' on the certain Record of Survey recorded November 25, 1966, as File No. 34665, Official Records of Douglas County, Nevada." As indicated previously, the Record of Survey shows that Parcel "H" contains 5.88 acres. Second, the terms of the deed and contract are not at variance. The deed and the documents that compose the contract all purport to convey 5.88 acres to the Hannemans. Finally the record reflects that the Hannemans expected to receive, and Swenson intended to convey, 5.88 acres of land, upon which was situated a "fixer-upper" house. In deed, Swenson admitted that she believed she was selling the Hannemans 5.88 acres and that no one would have paid $35,000.00 for only 1.5 acres.

For the reasons noted above, we conclude that the district court correctly determined that Swenson breached her agreement to convey 5.88 acres to the Hannemans.

4. Downer's Negligence

Downer contends that his actions did not fall below the standard of care for licensed surveyors because he made the proper assumptions when reaching his conclusions concerning the location of the northern boundary of Jacobsen's property. In

particular, Downer claims that field notes are presumptively correct until rebutted by a preponderance of the evidence and, therefore, he was required to assume that the calls and distances contained in the field notes were accurately measured and recorded. In contrast, the district court heard expert testimony that Downer was not entitled to rely upon the calls and distances in the field notes once he located the monuments and, if he could not locate a monument, he was required to reset the monument by a double proportionate measurement.

We conclude that substantial evidence supports the district court's determination that Downer failed to meet the requisite presented at trial, we have previously recognized that the location of monuments prevails over calls and distances:

> The trial court thus fully recognized, as a matter of law, that the original monument evidencing the corner common to sections 16, 17, 20 and 21, if found and identified or, if destroyed obliterated, if its location could be fixed), would control the situation irrespective of the field notes and, undoubtedly, irrespective of the testimony of the defendants' witnesses hereinafter referred to.

Backer v. Gowen, 73 Nev. 34, 39, 307 P.2d 765,768 (1957).[6]

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6 We also noted in Backer that the trial court's conclusion

Moreover, the district court expressly disbelieved Downer's testimony and relied instead upon the testimony of Neil Forsythe, a cadastral surveyor for the BLM, who indicated that the standard of care requires a surveyor to establish the four corners of a given section by identifying the locating of the original survey monuments. Downer contends that Forsythe was not qualified to render an opinion as to the standard of care because he is not a licensed surveyor in Nevada. Downer's contention lacks merit for two reasons: First, a person need not be licensed to qualify as an expert; rather, the witness must simply possess "special knowledge, skill, experience,
training or education" relating to the subject matter. NRS 50.275. Forsythe, a BLM surveyor for over thirty-five years, was qualified to testify on the subject of surveying methods. Second, employees of the federal government who have been authorized under federal law to conduct surveys need not be licensed unless they are performing private surveys within the state. NRS 625.490(4).[7]

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7 NRS 625.490(4) provides:

1. Any state, county, city or district employee directly responsible to a professional land surveyor.

2. Any subordinate to a professional land surveyor of this state, insofar as he acts as a subordinate.

3. Registered professional mining engineers engaged solely in surveys made for mining and milling purposes or facilities pertaining thereto.

The district court is better suited to rule on the qualifications of persons presented as expert witnesses and we will not substitute our evaluation of a witness's credentials for that of the district court absent a showing of clear error. The district court did not err in allowing Forsythe to testify as an expert.

5. Downer's Duty to Subsequent Purchasers

Downer contends that he owed no duty to subsequent purchasers of the subject property. We disagree. Surveyors may be held liable for the damages that result from their mistakes, misrepresentations, or negligence. See generally Dag E. Ytreberg, Annotation, Surveyor's Liability for Mistake in, or Misrepresentation as to Accuracy of, Survey of Real Property, 35 A.L.R. 3d 504 (1971). Lack of contractual privity between the parties is not a defense in an action for tortious negligence. Long v. Flanigan Warehouse Co., 70 Nev. 241, 245, 382 P.2d 399, 402 (1963) (the absence of contractual privity is not a defense to tort liability). A surveyor's duty has been held to extend to subsequent purchasers who relied upon the survey to their detriment. Rosney v. Marnul, 250 N.E.2d 656 (Ill. 1969); Cook Copnsultants, Inc. v. Larson, 700 S.W. 2d 231 (Tex. Ct. App. 1985). Downer fully understood that his survey

would affect future purchasers of the divided Jacobsen tract.

We conclude, consistent with the authorities cited above, that Downer indeed had a duty to the Hannemans as foreseeable subsequent purchaser of the property, and that Downer breached that duty, thereby causing damage to the Hannemans. Unfortunately, the district court properly found that Downer's negligence was the actual and legal cause of the Hannemans' damages, yet inexplicably assessed damages only against Swenson. This was error. Upon remand, the district court shall enter judgment for the amount of Hannemans' recalculated damages against both Swenson and Downer, jointly and severally. Of course, the modified judgment must again provide that Swenson may recover over against Downer any and all sums the Hannemans recover from Swenson.

Finally, Downer invokes the statute of limitations as a bar to the Hannemans' claims against him. Downer's references to NRS 11.203, 11.204 and 11.205 are misplaced. These three statutes all apply to actions related to an aspect of construction that eventuates in damage to the plaintiff. Our legislature has not enacted a specific period of limitations for surveyors, and therefore the "catch-all" statute, NRS 11.220, applies.[8] The Hannemans

were placed on notice that they may have had a cause of actin against Downer in 1981. The complaint against Downer was filed by the Hannemans in 1984, well within the four-year period of limitations specified under NRS 11.220. Therefore, Downer's attempt to avoid liability based upon the expiration of the period of limitations is meritless.

We have reviewed the remaining issues not heretofore discussed and have determined that they are without merit and need not be addressed.

CONCLUSION

For reasons discussed above, we reverse the inadequate award of damages to the Hannemans, and remand to the district court with instructions to

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8 NRS 11.220 entitled "Actions for relief not otherwise provided for" provides: "an action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."

In *Woods v. Lable Investment Corp.*, 107 Nev. 419, 812 P. 2d 1293 (1991), the parties were involved in a boundary problem that resulted in an encroachment on an adjacent lot. Although a surveyor was not sued, in the course of the decision we stated that "NRS 11.190 provides a six-year limitation period for contract actions and a two-year limitation on tort actions." The reference to a two-year period of limitation for tort actions was overbroad, as 11.190 (4) (d) (the two-year provision) applies only to personal injury and wrongful death actions. NRS 11.190 (3) (d) provides a three-year period of limitation for fraud which, of course, is a tort. Moreover, we have expressly held that NRS 11.220 (the so-called "catch -all" statute) "is the applicable statute for suits concerning tortious damage to real property." *Oak Grove Inv. v. Bell & Gossett Co.*, 99 Nev. 616, 621, 668 P.2d 1075, 1078 (1983). To the extent that our statement in Woods may be construed to apply to tort actions other than those for personal injury or wrongful death, it is hereby disapproved. Tort actions, such as the instant action, that are not expressly addressed by a specific statute of limitations are subject to the four-year period of limitations provided under NRS 11.220, the catch-all statute.

recalculate and increase the damage award to the Hannemans consistent with the views expressed in this opinion. The district court is also directed to enter judgment against Downer for the full amount Hannemans' damages so that Swenson and Down are jointly and severally liable for Hannemans' total damages. The district court shall also provide judgment in favor of Swenson against Downer for any and all sums that the Hannemans may recover against Swenson in satisfaction or partial satisfaction of their judgment. The judgment entered below is affirmed in all other respects.

_____, C.J.
Rose

_____, J.
Steffen

_____, J.
Young

_____, J.
Springer

Case No. 15029

Dept. No. 1

IN THE NINTH JUDICIAL DISTRICT COURT OF THE OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

-oOo-

ELDON HANNEMAN and PATRICIA HANNEMAN, husband and wife,

Plaintiffs,

vs.

MAXINE V. SWENSON; ROBERT DOWNER, dba DOWNER ENGINEERING; STODDARD JACOBSEN, et al.,

Defendants.

_____/

FINDINGS OF FACT, CONCLUSIONSOF LAW AND JUDGMENT

AND RELATED CROSS-CLAIMS

_____/

THIS MATTER came before the Court for a bench trial on November 18, 19, 20, 21, and 22, 1991, in Douglas County, Nevada. The Plaintiffs, (hereinafter referred to as the "HANNEMANS"), appeared in person

and were represented by JACK MCAULIFFE, ESQ.; Defendant MAXINE SWENSON, (hereinafter referred to as "SWENSON"), appeared in person and was represented by JOHN AEBI, ESQ.; Defendant ROBERT C. DOWNER, (hereinafter referred to as "DOWNER"), appeared in person and was represented by JON YAPLE, ESQ.; and Defendant STODDARD JACOBSEN, (hereinafter referred to as "JACOBSEN"), appeared in person and was represented by MICHAEL PAVLAKIS, ESQ. The Court heard testimony from seven witnesses and admitted 50 exhibits into evidence. This judgment is based on an evaluation of that testimony, a review of the exhibits entered into evidence, and a review of the pleadings and arguments on file with the Court or presented by counsel at trial.

Set out below is a discussion of the factual and procedural background behind this dispute and a summary of the proceedings at trial. Plaintiffs filed their complaint in this action on July 31, 1984. The trial of this matter was continued several times, over a period of five years, to allow DOWNER and JACOBSEN to pursue administrative remedies with the United States Bureau of Land Management, (hereinafter referred to as the "BLM"), and to attempt to avoid duplicative litigation in the event that the administrative process provided a remedy obviating the need for this trial. An understanding of that

process is necessary, and a discussion of the process is included, in order to completely understand the background of the current state law claims. In addition, an understanding of what occurred at trial is necessary to give full consideration to all of the parties' theories and arguments.

It is not within this Court's jurisdiction to establish any of the land boundaries which are in dispute because of ownership claims thereto by the BLM and Bureau of Indian Affairs, nor is it within this Court's jurisdiction to modify or affect any of the findings made previously by the BLM. However, the factual and procedural background recited below, and the synopsis of the trial proceedings, shall, for the purposes of this judgment, be integrated with and considered part of this Court's findings of fact and conclusions of law.

A. FACTS

On November 25, 1966, DOWNER recorded a survey map depicting land owned by JACOBSEN located within Section 9, Township 11 North, Range 21 East, Mount Diablo Base and Meridian, bordering a stretch of U.S. Route 395 in Douglas County, Nevada. By that map, DOWNER purportedly identified the boundaries of a piece of land owned by JACOBSEN. DOWNER purported to subdivide the land into seven parcels with their boundaries as indicated on his survey map.

In 1966 or 1967, JACOBSEN traded what he thought was 5.88 acres of land, indicated as parcel "H" on the DOWNER survey map, to Frank Frazier, a well driller, in return for services Frazier had provided to him. Because Frazier was illiterate, no deed was ever recorded to memorialize the transfer.

In 1972, Frazier sold parcel "H" to SWENSON, (who was then known as MAXINE KRIDLER). To facilitate that sale, JACOBSEN executed a grant, bargain and sale deed conveying his interest in parcel "H" to SWENSON.

In 1976, with the assistance of a realtor, SWENSON sold parcel "H" to the HANNEMANS. Pursuant to escrow, on June 22, 1976, SWENSON executed a grant, bargain and sale deed conveying her interest in parcel "H" to the HANNEMANS. In return, the HANNEMANS agreed, by way of a promissory note dated June 20, 1976, to pay $35,000 for the property: $7,500 down, with a principal balance of $27,000 bearing interest at 8% per annum, payable in monthly principal and interest installments of $200 per month on the note until April 22, 1982.

By letter dated July 28, 1981, Richard Harris, Esq., an attorney for an adjacent landowner, the Veta Grande Mining Company, notified the HANNEMANS that another private surveyor, J. D. (Jim) Jones, had prepared a record of survey for Veta Grande

which differed substantially from the DOWNER survey map. According to the Jones survey, the boundary between Sections 4 and 9 of Township 11 North, Range 21 East, Mount Diablo Base and Meridian, was substantially farther south than indicated on DOWNER's map. The Jones survey established a boundary between Sections 4 and 9, (that Section line is also the northern boundary of parcel "H"), which diminished the HANNEMAN holding dramatically. According to the Jones survey, the house, garage and well all encroach on land owned either by the Bureau of Land Management or by the Bureau of Indian Affairs.

As a result of the dispute which developed because of the discrepancies between the DOWNER and Jones surveys, DOWNER contacted the BLM to protest the Jones survey. At the behest of the BLM, Robert A. Pratt, a cadastral surveyor, under the direction of Neil Forsythe, performed a dependent resurvey of Sections 4 and 9 of Township 11 North, Range 21 East, Mount Diablo Base and Meridian between April 19, 1982 and January 5, 1983. The results of his survey also differed substantially from the DOWNER survey--most significantly with respect to the location of the boundary dividing Sections 4 and 9--such that only 1.54 acres of the intended 5.88 acres in parcel "H" actually remained.

On March 23, 1983, DOWNER and JACOBSEN filed a

formal protest of the dependent resurvey, specifically disputing the locations of the quarter corners common to Sections 4 and 9, the quarter corners common to Sections 4 and 5, and the corner common to Sections 4, 5, 8 and 9.

By order dated July 5, 1984, Ed Spang, the State Director of the BLM, dismissed the DOWNER/ JACOBSEN protest without a hearing. Director Spang stated that it was his opinion that DOWNER had not presented clear and convincing evidence proving that the BLM resurvey was not an accurate retracement and reestablishment of the lines of the original survey conducted by T. K. Stewart and G. W. Conkling in 1881.

DOWNER and JACOBSEN appealed from the dismissal, and on March 22, 1985, Administrative Law Judge (ALJ) Mullen of the United States Department of Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, (IBLA), set aside the dismissal and ordered a hearing on the protest before ALJ L. K. Luoma.

ALJ Luoma conducted a hearing on June 19, 20, and 21, 1985, in Reno, and on June 25, 1985 in Minden. In his written opinion, ALJ Luoma held that "because there appear to be so many deviations from the original calls and distances in BLM's resurvey as to cast doubt

on its accuracy..., I see no alternative but to remand the case to the BLM for resurvey." *Stoddard Jacobsen v. Bureau of Land Management*, IBLA 84-762 (September 27, 1985) (ROA 218, 230). ALJ Luoma remarked that he felt that several of the boundary locations, as depicted by DOWNER, more accurately reflected the original survey descriptions than did depictions by the BLM. ALJ luoma was not convinced, however, that the evidence fully supported DOWNER's depiction of the boundary between Sections 4 and 9. ALJ Luoma held that the monuments relied upon by the BLM had not been proven "beyond a reasonable doubt." He also concluded that a theory held by DOWNER--that the original surveyors fraudulently established "double corners"--was not supported by the evidence proffered.

The BLM, and DOWNER and JACOBSEN, appealed from ALJ Luoma's decision. The BLM wanted further guidance on how to conduct the resurvey and on the correct standard of proof necessary to establish the location of the original survey monuments, and DOWNER and JACOBSEN contended that the resurvey was appropriate, but that the BLM should be instructed to use the monuments and honor calls determined by DOWNER as the ones conforming most reasonably to the calls and distances recorded in the original notes and plat. On May 8, 1987, in *Stoddard Jacobsen v. Bureau of*

Land Management, 97 IBLA 182 (1987), the IBLA affirmed ALJ Luoma's opinion that the BLM should conduct a resurvey. The Board noted its doubt as to some of the evidence presented below by DOWNER and JACOBSEN, (notably the 1/4 corner common to Sections 4 and 9). The Board also noted, however, that DOWNER and JACOBSEN's evidence generally supported the accuracy of their theory about the 1881 survey, while the evidence of discrepancies presented by the BLM almost supported the case for a fraudulent survey, despite the BLM position to the contrary. Consequently, the Board confirmed ALJ Luoma's order for a resurvey, giving the BLM the latitude to conduct either a dependent or an independent resurvey.

In *Stoddard Jacobsen v. Bureau of Land Management*, 103 IBLA 83 (1988), on Petition for Reconsideration by the BLM, the Board reversed itself again, in part. Although it affirmed the validity of the 1982 survey, the Board held that in its previous decision, "a new evidentiary standard was improperly set forth therein for determining whether a corner is existent." Id. at 46. The Board held that the proper standard for the BLM to apply to establish the monuments for use in a resurvey was to consider a corner existent (or found) if such a conclusion was supported by substantial evidence. The Board then applied the substantial evidence

standard to the BLM resurvey evidence, and decided that the BLM had established all the survey monuments, but expressed concern over the angle of deflection created along the 4/9 Section line by the placement of the corner common to Sections 3, 4, 9 and 10. Consequently, the Board directed the BLM to perform a double proportionate resurvey of the property to reduce the angle of deflection produced by placement, in 1982, of the corner common to Sections 3, 4, 9, and 10. Effectively, the ruling affirmed the 1982 survey except as to the placement of that corner.

On July 20, 1988, Downer filed a Motion for Reconsideration, and the IBLA Board ruled that its decision was administratively final.

On August 1, 1988, during the resurvey to reduce the angle of deflection along the boundary between Sections 4 and 9, the BLM survey team found what the BLM now considers to be the original monument marking the corner common to Sections 3, 4, 9 and 10.

On September 8, 1988, the IBLA Board amended its order in light of the "found" corner to obviate the need for a double proportionate resurvey.

DOWNER, alone, appealed to the United States District Court for the District of Nevada, complaining that his survey was still the most accurate depiction of the boundaries established by the original survey. Judge Edward C. Reed dismissed DOWNER's appeal on

October 10, 1989, citing Downer's lack of standing to complain about the IBLA actions.

DOWNER's appeal of Judge Reed's decision is currently pending before the Ninth Circuit Court of Appeals.

At the commencement of trial, the Court noted that ROBERT G. DOWNER had been dismissed from the case, and that although there was no Answer on file on behalf of ROBERT C. DOWNER, the parties had proceeded as though he had filed a general denial of all claims and cross-claims against him.

The plaintiffs first called Neil Forsythe, a cadastral surveyor for the BLM, who testified about the various surveys conducted on the land in and around Section 9, Township 11 North, Range 21 East, Mount Diablo Base and Meridian. Forsythe has worked for some 30 years as a cadastral surveyor for the BLM.

He testified as to the standard of care for surveyors in Nevada, both before and after the time of the DOWNER survey, as set forth in two editions of the Manual of Surveying Instructions, made binding on Nevada surveyors by Chapter 625 of the Nevada Revised Statutes. Forsythe then compared and contrasted the method utilized by DOWNER with the method required by the Manual of Surveying, and the methods utilized during the BLM dependent resurvey

in 1982-83. Forsythe introduced an exhibit which graphically demonstrated the difference between DOWNER's original survey, subsequent surveys DOWNER performed in an attempt to bolster his argument before the BLM, and the BLM resurveys.

Forsythe testified that the standard of care is to establish, by identifying the location of the original survey monuments, the four corners of a given section, then to subdivide the section into quarters, and then to subdivide each quarter into sixteenths and so on until a rectangle of land containing the target possession can be tied to known monuments. According to Forsythe, DOWNER only positively identified one corner in his original survey--the southeast corner of Section 9--and that he utilized that corner as the major point of reference which he relied upon, together with the calls and distances from the Stewart and Conkling survey notes, to tie into JACOBSEN's land.

In essence, Forsythe testified that the major reason DOWNER's survey varied from all other surveys, and fell below the standard of care, was because of the method DOWNER used to "tie" into and establish the boundaries of JACOBSEN's land, which method was premised on two major assumptions DOWNER necessarily made about the accuracy of the Stewart and Conkling survey--(1) that the calls and distances in the Stewart

and Conkling survey were accurately measured and recorded; and, (2) that Section 9 contains exactly six hundred and forty acres.

Forsythe felt that DOWNER's primary assumption that the original survey calls and distances were accurate, and controlling, was by itself a major mistake which was compounded by his further assumption that Section 9 contains six hundred and forty acres. He maintained that DOWNER's dogmatic insistence on reasoning from the calls and distances in the Stewart and Conkling survey without also establishing the location of the original corners inevitably led to an inaccurate survey. Forsythe illustrated how, in order for DOWNER to establish boundaries which would circumscribe an area of 640 acres within a rectangle corresponding to the 1881 calls and distances, DOWNER had to "adjust" the 4/9 Section line northward from the line actually established by the original surveyors.

According to Forsythe, one of the major reasons the survey manual requires that surveyors locate the position of the original monuments marking corners, (and the reason that monuments control over calls and distances), is to avoid precisely the kind of problem DOWNER encountered. He said that the original surveyors frequently did not run survey lines to establish accurate calls and distances between all

of the monuments in a given area like Section 9, and that such was especially the case in a "rural" section. (It was Forsythe's opinion that surveyors in the late nineteenth century only ran all of the section boundaries in and around towns where the calls and distances between monuments would be carefully scrutinized.) He testified that it would have been physically impossible for Stewart and Conkling to survey the entire 84 miles in and around section 9 within the six days actually devoted to the survey in that area, and their calls and distances must therefore have been estimates. Further, in over thirty-five years with the BLM, Forsythe has never found a section which actually contains six hundred and forty acres. Forsythe surmised that DOWNER had to shift the northern boundary of section 9 north of the Stewart and Conkling boundary to be consistent with the calls and distances recorded in the original survey while at the same time establishing an area within Section 9 encompassing six hundred and forty acres. (Forsythe testified that he has actually age dated blazed trees which are positioned around the BLM location of the corner common to Sections 4, 5, 8, and 9 to the date of the Stewart and Conkling survey, and that is one reason why he is sure of the BLM's location of the northern boundary of Section 9.)

It was Forsythe's opinion that DOWNER did not meet the standard of care for surveyors in Nevada, and that his survey did not fall within acceptable margins of error. Forsythe stated that he is absolutely sure that the north and east boundaries of Section 9, as established by DOWNER, are incorrect.

Steven R. Johnson, MAI, testified for the Plaintiffs regarding the value of the property and improvements. Johnson testified that his appraisal of the home, garage and a land area of 5.88 acres would be $67,000--$35,000 for the land and $32,000 for the improvements. He testified that his appraisal for the improvements was based on his assumption that the house would be repaired to a habitable condition, first, and that the property would actually be marketable. On cross, he acknowledged that the "comparable" properties used for comparison were all habitable, and that each of those properties had a fair market value substantially in excess of the target, and he further admitted that at the time of his inspection in April of 1990 the house was uninhabitable and most of the fixtures had been removed. He agreed that the cost to repair the residence and garage would be a reasonable deduction from his appraisal of the value of the improvements to the land. He also confirmed that none of the trees, bushes and shrubs planted by HANNEMAN were

still alive in 1990. Finally, Johnson testified that a 1.54 acre sliver of land, the remainder of SWENSON's holding after the BLM survey, would be worth, at most, $1,000.

ELDON HANNEMAN testified, on his own behalf, that he and his wife purchased parcel "H" from SWENSON on the terms and conditions outlined above. He testified that he learned about the property through a realtor, and purchased it as a "fixer-upper." Over the years, he labored many hours, (in excess of 2,000 hours as specified in Plaintiff's Exhibit "R"), to make the home and garage habitable and useable, and installed fixtures and utilized materials for improvements with an actual cost of $15,145. (Plaintiff's Exhibits "1" and "P"). He testified that he made payments to SWENSON of $200 per month, principal and interest, from the date of purchase in 1976 until April 22, 1982, when he learned of the boundary dispute. He said he continued to occupy the property, without paying rent, from April 22, 1982 until late 1985. He originally deposited the monthly mortgage payments in an interest bearing account, for the benefit of SWENSON, until the controversy over the land could be settled. But, after he finally left the property in the fall of 1985 because he felt he was trespassing on government land, he used the money from the "trust" account as

a down payment on the purchase of a new home in Fernley in October of 1988. He further testified that when he departed, he took many of the fixtures and improvements with him. (Plaintiff's Exhibit "1") He acknowledged that neither SWENSON nor the BLM ever demanded that he leave the property.

JACOBSEN testified as an adverse witness for the HANNEMANS. JACOBSEN testified that he hired DOWNER to perform a survey in order to subdivide some of his property. He testified that he traded the property indicated as parcel "H" on the DOWNER survey map to Frank Frazier, a well driller, in return for services Frazier had provided to him. He testified that no deed was ever recorded memorializing the transaction because Frazier was illiterate. He testified that he joined DOWNER's protest of the BLM resurvey at DOWNER's request and because he believed that DOWNER's survey was, and is, the correct survey.

The HANNEMANS rested, and JACOBSEN moved for an involuntary dismissal, with prejudice, of the HANNEMANS' Complaint and SWENSON'S Cross-Claim against him, pursuant to NRCP 41(b). The Court granted JACOBSEN's motion with regard to the HANNEMANS' Complaint against him, noting that no evidence was presented establishing any contract between the HANNEMANS and JACOBSEN; no evidence was presented that JACOBSEN was in any way negligent for hiring

DOWNER or relying on DOWNER's survey; and no evidence was presented showing that JACOBSEN made any express representations sufficient to create a warranty of title. The Court noted that none of the parties could present evidence overcoming the authority cited by JACOBSEN in 6A *Powell on Real Property* (1991), Paragraph 898 [1] [b], page 81A-46, which instructs that a metes and bounds description in a grant, bargain and sale deed does not create an express representation or warranty that the property described therein is actually possessed by the grantor. Further, at the time JACOBSEN transferred the property, there were not any liens or encumbrances on the property, nor had JACOBSEN transferred the property to anyone else. Thus, the warranties implied by NRS 11.170 were not breached.

The Court reserved ruling on JACOBSEN's NRCP 41(b) Motion regarding SWENSON's Cross-Claim until after the presentation of SWENSON's case-in-chief.

SWENSON's case consisted of two witnesses: Odd ("Kelly") Larsen, and SWENSON herself. Larsen testified as to the repairs needed to make the home on parcel "H" habitable, and to the cost of repairs necessary on the garage. Plaintiff's Exhibit "Y" is a bid for repairs, prepared for SWENSON by Larsen, estimating $15,008.60 would be necessary to return the house and garage to habitability. Larsen testified

that repairs are necessary because of the way in which fixtures were removed, because of the kind of fixtures which were removed, and because the property has apparently been vandalized since HANNEMAN departed.

SWENSON testified on her own behalf. She confirmed that she sold the property to the HANNEMANS under the terms cited, that a realtor, Tom Gardner, facilitated the sale by listing the property as 5.88 acres with a house, garage and well, and that the transaction was handled through an escrow. She also testified that although JACOBSEN executed the deed transferring the property to her, she paid the $9,500 purchase price for the land to Frazier. SWENSON confirmed that she forclosed on the property in 1988 when the HANNEMANS stopped paying the property taxes and insurance on the home.

After SWENSON rested, JACOBSEN renewed his NRCP 41(b) motion. During argument on that motion, counsel for SWENSON acknowledged that he could find no authority supporting the proposition that the metes and bounds description in the grant, bargain and sale deed between JACOBSEN and SWENSON constituted a contract.

This Court granted JACOBSEN's motion and dismissed JACOBSEN from the case.

DOWNER then presented his case-in-chief, which

consisted solely of his own testimony. DOWNER related that as of the time of trial he was 81 years old, and had been involved with surveying in various capacities for approximately 60 years. After lengthy testimony regarding his education and experience, DOWNER requested that the Court qualify him as an expert witness on his own behalf. The Court denied his motion, commenting that it would be inappropriate to give DOWNER's own, self-serving, testimony more weight than appropriate by specifically qualifying him as an expert.

DOWNER defended his survey by first commenting that the method described by Forsythe would have been financially unworkable in he context of such a small subdivision. According to DOWNER, the usual practice of most surveyors presented with a similar task is to follow the method he used so that their surveys are conducted in an economical manner.

Next, DOWNER recited a number of factors which led him to reject the northern boundary of Section 9, and, in particular, the northwest corner of Section 9. DOWNER felt, based on work performed for his original survey in 1965 and on many hours of work performed subsequently, that Stewart and Conkling placed double corners along the northern boundary of Section 9, and throughout Township 11. He later acknowledged, however, that at least three other

surveyors who have surveyed the property since 1965 have accepted the monument he rejected as the northwest corner of Section 9 during one of his later surveys.

Nonetheless, DOWNER unequivocally stated that he was comfortable in 1965 with is location of the northern boundary of Section 9 and he has not changed his opinion since. In fact, DOWNER said that the work he has done on this problem since 1965 has led him to believe that the northern boundary of Section 9 should actually be thirty feet north of where he placed it in 1965.

On cross, DOWNER admitted that he also never located, in 1965, the northeast corner of Section 9, but that he established the northern boundary of Section 9 anyway. He also admitted that he never found a monument along the chop line which he believes marks the section line. DOWNER reiterated that the only monument he physically located in 1965 was the southeast corner of Section 9.

After DOWNER rested, the parties argued their respective positions.

The HANNEMANS argued that DOWNER did not meet the standard of care for a licensed surveyor, and that he was therefore negligent. They argued that his duty of care extended to the public as a whole because subdivided land is foreseeably going to be sold to innumerable parties yet to be determined at

the time of the survey. The HANNEMANS assert that their damages should be measured by either one of two standards: benefit of the bargain, or out of pocket expenses. They relied on the appraisal by Johnson, ($67,000), to establish what the benefit of their bargain would have been; or, alternatively, said that their damages are the sum of Mr. HANNEMAN's labor, material costs, monthly mortgage payments until he moved off the property, and their $7,500 down payment--a total of $53,004.65.

SWENSON concurred with the HANNEMANS insofar as DOWNER's negligence was concerned, and also argued for a judgment against the HANNEMANS for non-payment on the promissory note. SWENSON asserted that her damages are $26,019.48, (minus the $1,000 value of the remaining sliver of land), plus interest on the unpaid balance at 8%, plus attorneys fees of $10,000. SWENSON argued that the HANNEMANS failed to mitigate their damages, and that there is no legal basis to recover the cost of improvements--and especially that Mr. HANNEMANS' labor is not a compensable item. SWENSON felt that the reasonable rental value of the property, ($22,000 for the 111 months they occupied the property), should be deducted from any award against her. SWENSON closed with her theory that the grant, bargain and sale deed does not supply any evidence of a contract for the sale of 5.88 acres to

the HANNEMANS.

DOWNER closed by imploring the Court to render an opinion declaring that what the BLM has done is wrong and that the BLM is responsible for an American tragedy. DOWNER argued that his actions must be evaluated on the basis of the information available to him in 1965, and that Forsythe was compelled to support a lousy survey in order to avoid dealing with his own mistakes. He believed that he has proved that the BLM survey is wrong, and that the Court must necessarily conclude that he was not negligent.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. SWENSON contracted to sell 5.88 acres of land to the HANNEMANS.

a. The property description contained in the listing SWENSON utilized to sell the property to the HANNEMANS, together with the surrounding circumstances of the land sale transaction, created a contract for the sale of 5.88 acres, specifically, and SWENSON's inability to convey 5.88 acres was a breach of that contract due to a failure of consideration.

2. The value of the land remaining after the BLM administrative findings is $1,000.00, and the mortgage payments and improvements made by the HANNEMANS are not compensable.

a. The Court specifically dismisses the appraisal of the value of the property and improvements made by Stephen R. Johnson. Mr. Johnson's appraisal was based on his evaluation of "comparable" properties which were all marketable, habitable, and significantly more valuable than the property which is the subject of this lawsuit. He admitted himself that his appraisal was based on the assumption that the house was located on 5.88 acres of marketable land. Johnson did not provide any evidence of the value of an uninhabitable house located on government land. His only testimony regarding the actual state of affairs was that the 1.54 acres remaining would be worth, at most, $1,000.

b. Not only is there no legal basis for the HANNEMANS to recover the value of the improvements they made, the HANNEMANS failed to mitigate their own damages. Although ELDON HANNEMAN claims that he left slightly more than $12,000 worth of fixtures and improvements behind when he vacated the property, and that the labor he invested in improving the land and home should be compensated, there was ample testimony that the products of his labor and the value of the improvements left were largely destroyed because of the way in which he finally vacated the property. In fact, Odd Kelly submitted a bid to

make the repairs necessary to return the home to habitability totaling $12,898.21.

c. The monthly mortgage payments the HANNEMANS made to SWENSON between 1976 and 1982 are completely offset by the reasonable rental value they received by occupying the property during that period.

3. DOWNER acted unreasonably, and he negligently performed the survey he recorded in 1966.

a. DOWNER's behavior on the stand was deliberately evasive and non-responsive to the questions asked of him, and, as a result, he was not a credible witness. It is abundantly clear from the evidence presented that DOWNER failed to act reasonably when performing his survey in 1965, and that his actions since that time have been singularly designed to shore up his position after the fact. Plaintiff's Exhibit D is the most graphic illustration of DOWNER's failure to meet the standard of care. Every one of his own surveys since 1965 differs from the previous one, and every one of his surveys establishes boundaries in Section 9 which are different from the BLM survey. As Forsythe pointed out, DOWNER's method and assumptions inevitably led, and continue to lead to inconsistent and unreliable results. Without first establishing the monuments marking the boundaries of Section 9, particularly

when monuments control over calls and distances, DOWNER is doomed to continue to propagate the wrong boundaries. The Court does not believe that DOWNER intentionally established the wrong boundaries, but he has been singularly unwilling to admit even the possibility of error on his own part, and that has compounded the gravity of his poor survey results.

b. DOWNER owed a duty of care of JACOBSEN, SWENSON and the HANNEMANS, (as the ultimate purchasers of the property subdivided by DOWNER), when he performed his original survey in 1965. DOWNER breached that duty by failing to meet the standard of care applicable to surveyors in Nevada, and his breach of that duty was the cause in fact and proximate cause of the damages incurred by SWENSON and the HANNEMANS.

C. JUDGMENT

1. The Court finds in favor of the HANNEMANS and against SWENSON in the amount of $7,500.00, plus interest since July 22, 1976. That amount represents the HANNEMANS' compensable out of pocket expenses incurred as a result of SWENSON's failure to convey 5.88 acres of land.

2. The Court finds in favor of SWENSON and against DOWNER in the amount of $7,500, plus interest since April 22, 1976 which represents SWENSON's liability to the HANNEMANS.

The Court also finds in favor of SWENSON as

against DOWNER in an amount equal to SWENSON's loss on the balance of the note due after April 22, 1982, ($25,019.48--$26,019.48 as reflected on Plaintiff's Exhibit "S" minus the $1,000.00 value of the remaining land), plus interest at 8% since that date, which represents her loss on the sale to the HANNEMAN's occasioned by DOWNER's negligent survey.

3. The Court awards Hanneman and Swenson their taxable costs against DOWNER, and reasonable attorney's fees of $10,000 to the HANNEMANS against DOWNER and $10,000 to the SWENSONS against DOWNER.

IT IS SO ORDERED.

DATED this 27th day of March, 1992.

/s/ Michael

E. Fondi

DISTRICT

JUDGE

CC: Counsel of record

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDON HANNEMAN and PATRICIA HANNEMAN, HUSBAND and WIFE

Appellants,

vs

ROBERT C. DOWNER, MAXINE V. SWENSON, and STODDARD JACOBSEN,

Respondents.

/

No. 23434

ROBERT C. DOWNER,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA HANNEMAN, HUSBAND and WIFE; MAXINE V. SWENSON; STODDARD JACOBSEN,

Cross-Respondents.

/

MAXINE V. SWENSON,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA HANNEMAN, HUSBAND and WIFE; ROBERT C. DOWNER; and STODDARD JACOBSEN,

Cross-Respondents.

/

CROSS-APPELLANT/RESPONDENT/CROSS-RESPONDENT

ROBERT C. DOWNER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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SWENSON, and STODDARD JACOBSEN,
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ROBERT C. DOWNER; and STODDARD
JACOBSEN,
Cross-Respondents.

_____/

No. 23434

I.

THE STANDARD OF CARE, AS SET FORTH BY APPELLANTS HANNEMAN, IS ERRONEOUS

At page 11 of Appellant Hannemans' Reply Brief, Backer v. Gowen, 73d Nev. 34, 307 P.2d 765 (1967) is cited for the proposition that, at the trial court level, the standard for re-establishing a boundary is substantial evidence. The use of this standard at the trial court level is incorrect. The standard quoted in that case is an appellate standard:

> "The question involved is almost entirely a factual one and we have concluded that there is substantial evidence in the record to support the trial court's rejection of the plaintiff's contentions that the evidence compelled an acceptance of a point fixed in the center line of the highway as the discovered original government corner and original government monument evidencing the same fixed by the original government survey of 1881."

See Matese v. Bottom, 73 Nev. 236, at 239, Head Note 2, 316 P.2d 929, which is a contract case. See also Lucy v. First National Bank, 73 Nev. 64, 307 P.2d 774, at 67, which is a personal injury case. Thus the Hannemans are incorrect when they state that "the announced standard in this state, since 1957 at least, in reestablishing a boundary, is substantial evidence."

II.

DOWNER'S CREDIBILITY

As set forth in Hannemans' Reply Brief page 6, the Court below found that Downer was not a credible witness. The Court came to this conclusion because of an erroneous assumption concerning the methodology for determining the location of monuments. An understanding of the procedures set forth in the Manual of Survey Instructions (1947), (hereinafter 47 Manual, is critical to the evaluation of Downer's actions. His responses throughout the trial are directly parallel to the standards set forth in the 47 Manual. Fortunately, the facts in this case do not depend on Downer's credibility. Downer's position is absolutely supported by facts that are either uncontroverted, set forth in the 47 Manual, or have been previously decided by a preponderance of the evidence by the Federal Administrative Tribunal. These facts are set forth in Downer's opening brief and in the remainder of this brief.

III.

DOWNER FOLLOWED THE PROPER PROCEDURE

Downer's conduct must be measured against the procedures set forth in the 47 Manual. Both Downer and Forsythe (the Hannemans' "expert") indicated the 47 Manual controls the methodology of a survey (ROA V4, p847 L22-p848 L7, p66; ROA V7, p536).

The Court below, on page 20 of its Finding of Fact and Conclusions of Law and Judgment, stated:

> "As Forsythe pointed out, DOWNER's method and assumptions inevitably led, and continue to lead to inconsistent and unreliable results. Without first establishing the monuments marking the boundaries of Section 9, particularly when monuments control over calls and distances, DOWNER is doomed to continue to propagate the wrong boundaries."

Downer followed the procedure as set forth in the 47 Manual for "establishing the monuments." The procedure is as follows:

> "353. If the evidence of the monument is not fully conclusive, the engineer's attention will be directed at once to the record accessories; this step is so generally necessary that it should be considered simultaneously with the search for the monument; in fact, in their broader significance the accessories are a part of the monument.
>
> The underlying principles relating to the identification of the corner accessories, subject to the changes which may be expected in the period intervening after the date of the original survey, have already been fully outlined in chapter IV. It will suffice to state that the evidence of the accessories should agree with the record contained in the field notes of the original survey, subject only to such changes as reasonably may be expected." (Emphasis added)

Forsythe does not follow this above standard.

"Q. Now, isn't it true that the evidence to be

accepted should agree with the record in the field notes? A. No." ROA V4, p77.

The Administrative Tribunal at 97 IBLA at 219 makes the observation that, "the ability to discount the mass of evidence which tends to disprove BLM's placement of the various corners is not unique to BLM..."

From the Trial Court's decision, it appears that any pile of rocks, when found, becomes a corner. As shown above through the excerpt of the 47 Manual this is not the case. When a surveyor comes upon a pile of rocks that may be a monument, he is to examine the evidence of the monument. If that evidence is not fully conclusive, "the engineer's attention will be directed at once to the record accessories." "This step is so generally necessary that it should be considered simultaneously with the search for the monument, in fact, in their broader significance the accessories are a part of the monument" (supra).

None of the monuments that the BLM claims to have found are "fully conclusive." This was not only Downer's opinion, but also that of the Administrative Tribunal (97 IBLA 182). The Administrative Tribunal found, when analyzing the W 1/4 of 4 that, "We and [sic] note that, in this respect, the BLM stone is 'widely different from the record'." Thus, Downer is instructed by the 47

Manual to further investigate and not blindly accept that monument.

Regarding the NW of 9, the Court held, "We now conclude, in accordance with the survey manual at 5-7, [1973 Survey Manual] [1947 Manual §353] that the nature of the accessories is 'greatly at variance with the record'" 97 IBLA at 214.

Concerning the 1/4 corner between sections 4 and 9, the IBLA stated:

> "The fact remains that BLM's 1/4 corner does not match the call to 'Carter's house' whereas appellant's corner does, within a reasonable level of tolerance. This also raises doubts as to the accuracy of BLM's location of a south 1/4 corner." (Citations omitted) 97 IBLA at 197

Additionally, there were no bearing trees at that corner. There should be two (ROA V3, p117).

> "There being a reasonable doubt, the 1/4 corner described in the resurvey notes and monumented by BLM cannot be considered to have been found, and the monument described cannot be deemed a faithful perpetuation of the original corner. We find no error in Judge Luoma's conclusion." 97 IBLA at 218

BLM's 1/4 corner between sections 4 and 9 is not an original corner.

> "The monument discovered by the Jones survey [and adopted by the BLM] is admittedly not the original monument." (Brackets added) 97 IBLA at 189.

Thus, evidence to support the location of the monuments that the BLM has relied upon is "not fully conclusive."

If the evidence of the monument is not fully conclusive, then "It will suffice to state that the evidence of the accessories should agree with the record contained in the field notes of the original survey, subject only to such changes as reasonably may be expected" (47 Manual §353).

The 47 Manual, continues as follows:

> "354. In case of material disagreement between the particular evidence in question and the record calls, the process of elimination of those features regarding which there may be doubt, after making due allowance for natural changes, will serve a most useful purpose, as follows:
>
> (a) The character and dimensions of the monument in evidence should not be widely different from the record;
>
> (b) The markings in evidence should not be inconsistent with the record; and,
>
> (c) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.
>
> A certain measure of allowance for ordinary discrepancies should enter into the consideration of the evidence of a monument and its accessories, and no definite rule can be laid down as to what shall be sufficient evidence in such cases. Much must be left to the skill, fidelity, and good judgment of the

engineer in the performance of his work, ever bearing in mind the relation of one monument to another, and the relation of all to the recorded natural objects and items of topography.

No decision should be made in regard to the restoration of a corner until every means has been exercised that might aid in identifying its true original position. The retracements, which are usually begun at known corners, and run in accord with the plan of the original survey, will ascertain the probable position, and will show what discrepancies are to be expected; any supplemental survey record or testimony should then be considered in the light of the facts thus developed. A line will not be regarded as doubtful if the retracement affords the recovery of acceptable evidence." (Emphasis added).

The two rock piles (NW of 9 and N 1/4 of 9) were not fully conclusive. Downer then compared their position with the record calls and distances in the notes and plat. His findings, as set forth in his previous brief and herein were in such disagreement that he was compelled to dismiss these piles of rock.

Downer did re-do the survey starting from a known corner and he did run it in accord with the plan of the original survey (i.e., following the survey notes).

"Corners which cannot be recovered by evidence of monuments or accessories are regarded as obliterated to the extent that they may still be recovered on the basis that

their location has been 'perpetuated' or that collateral evidence establishes their location. Id. at 5-9. Such collateral evidence is generally considered to be 'proper relation to known corners, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line tree blazes, etc., or unquestionable testimony.'" (Emphasis added) 97 IBLA 182 at 186.

The import of the above is that if there is a question concerning the monument, the surveyor should look to all available evidence including the notes and plat. Because the plat map and notes are part of the patent granted to Carter in 1882, they assume additional significance. The 47 Manual, § 562, states:

"562. The importance, and legal significance, of the plats and field notes is set out in Alaska United Gold Mining Co. v. Cincinnati-Alaska Mining Co., 45 L.D. 330, 336 (1916), as follows:

'It has been repeatedly held by both State and Federal courts that plats and field notes referred to in patents may be resorted to for the purpose of determining the limits of the area that passed under such patents. In the case of Cragin v. Powell (128 U.S. 691, 696), the Supreme Court said:

'It is a well settled principle that when lands are granted according to an

> official survey of such lands, the plat, itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they were conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.'
>
> These legal principles apply to subsequent deeds of transfer related to the official plat." (Emphasis added).

The Trial Court's error was that it assumed that any pile of rocks was a monument. The Trial Court never analyzed the methodology necessary to determine if a pile of rocks is the "monument." The 47 Manual, as demonstrated above, specifically sets forth this methodology. Downer followed these instructions and made the proper determination. If the monument is not fully conclusive, calls and distances must be used to determine the probable position of the original monument. According to the 47 Manual, "Much must be left to the skill, fidelity, and good judgment of the engineer in the performance of his work, ever bearing in mind the relation of one monument to another, and the relation of all to the recorded natural objects and items of topography." Not only by the "good judgment" of Downer, but by

the decision of the IBLA Tribunal when using th preponderance of evidence test, Downer's survey i the more correct. "Appellants' evidence generall supports the accuracy of the 1881 survey." (97 IBL 182 at 219).

IV.

DOUBLE PROPORTIONMENT WAS NOT AN AVAILABLE ALTERNATIVE IN 1965

Hannemans argue that, "if a corner was lost o obliterated that he [Downer] had a duty to reset th corner by double proportionant measurement." Thi is not what the manual directs. An obliterate corner can be reestablished from the notes and plat

> "355. An obliterated corner is one a whose point there are no remaining traces o the monument, or its accessories, but whos location has been perpetuated, or the poin for which may be recovered beyond reasonabl doubt, by the acts and testimony of th interested landowners, competent surveyors, o other qualified local authorities, or witnesses or by some acceptable record evidence.
>
> A position that depends upon the use o collateral evidence can be accepted only a duly supported, generally through prope relation to known corners, and agreement wit the field notes regarding distances to natura objects, stream crossings, line trees, and off line tree blazes, etc., or unquestionabl testimony." 47 Manual, section 355.

> "No decision should be made in regard t the restoration of a corner until every mean has been exercised that might aid in identifyin

its true original position. The retracements, which are usually begun at known corners, and run in accord with the plan of the original survey, will ascertain the probable position, and will show what discrepancies are to be expected; any supplemental survey record or testimony should then be considered in the light of the facts thus developed. A line will not be regarded as doubtful if the retracement affords the recovery of acceptable evidence." 47 Manual, section 354.

Downer considered double proportionment (ROA V7, p449). However, he did not find enough reliable points with which to accomplish this task. He therefore determined to follow the notes and plats from a known good corner (ROA V7, p450).

The Administrative Tribunal, in 97 IBLA 182 at 220, stated:

"If proportionant measurement is used to set the corner common to secs. 4, 5, 8, and 9, care should be exercised to determine if the corner can be more readily determined using reliable topographic calls or other evidence set forth in the 1881 field notes, rather than the corner common to secs. 4 and 5, T. 11 N., R. 21E., and secs. 32 and 33, T. 12 N., R. 21 E., which was reestablished in the 1973 resurvey of T. 12 N., R. 21 E. See Survey Manual at 5-16. [1973 Survey Manual]"

Thus the IBLA cautioned against double proportionment.

V.

THE TRIAL COURT'S RULING IS BASED ON PHYSICAL IMPOSSIBILITIES

On page 12 of their Reply Brief, the Hannemans set forth the definition of the preponderance of the evidence test. The Court being found, by a preponderance of the evidence, that Downer failed to act reasonably. Not only has it been shown that Downer followed the 47 Manual which sets his standard of conduct, but this ruling means that the Trial Court ignored the fact that a line drawn from the BLM's placement of the northwest corner of 9 on the bearing contained in the 1881 notes passes two chains south of a tunnel. The 1881 notes say that that line passes one chain north. The IBLA stated, "We are unwilling to believe that the original surveyor could not distinguish north from south however inaccurate they may otherwise have been" (97 IBLA at 198). Not only is this determination res judicata but the fact is that no reasonable person would assume that north meant south or that south meant north. Additionally, no reasonable person could believe that a stone that was actually 16" x 10" x 5 and granite, was the same stone that was described in the 1881 notes as 42" x 40" x 24" and trachyte [1/4 of 4]. Thus, the logical inconsistencies are apparent.

The Trial Court cannot disagree with Judge Luoma's conclusion. "Judge Luoma particularly found 'most disturbing' the fact that the BLM's resurvey was in 'complete non-conformity to the record calls'" (97 IBLA at 215).

Forsythe testified at the Trial Court that he "didn't hit all the 1881 calls exactly." ROA V4, p145. This is a far cry from "complete nonconformity."

From the above, it is apparent that the Court below based its conclusion concerning Downer's negligence on the fact that the BLM found a pile of rocks and that monuments control over calls and distances. However, as shown above, the Court never analyzed or considered that the first step in this process is to determine whether or not a pile or rocks is the actual monument. That process is specifically spelled out in the 47 Manual and was specifically followed by Downer. His conclusions in relation to those monuments are supported by the IBLA decisions.

VI.

THE NORTHWEST CORNER OF 4

This issue has been addressed in Downer's opening brief, on page 18, and also on page 26 beginning at line 9.

The fact that Forsythe, in 1973, chose corners in that northern section that Downer had discarded,

and later, in 1982, used those corners to support his placement of the northern line of section 9, cannot be used to reflect on Downer's actions in 1965. As noted, the IBLA opinioned that these points were (1) suspect, and (2) shouldn't be used in setting the NW of 9, See 97 IBLA at 211, ft.note 35 and at 220. Forsythe stated that, at the administrative level, Downer presented no contradictory evidence. "A. Isn't it true, that Mr. Downer did present evidence of that contradicted evidence as to the location of the north boundary line of section 4? A. No, he did not. IBLA said he didn't." ROA V4, p190.

VII.

THE HIGHWAY SURVEY

On page 7 of their Reply Brief, the Hannemans support Forsythe's placement of the NW of 9 and the N 1/4 of 9 (S 1/4 of 4) by reference to a Highway department survey. The Administrative Law Tribunal, in 97 IBLA at 189 stated:

> "In his September 1985 decision, Judge Luoma did not accept BLM's location of the south 1/4 corner, referring to the lack of testimony regarding the State highway department's 'methodologies' and 'BLM's reconstruction of a purported monument.' (citation omitted) We also find that there is a definite absence of any testimony regarding how BLM or the Jones survey translated the State highway department right-of-way maps and

field notes into a fixed location for the 1/4 corner. Moreover, even assuming that this can be done, the accuracy of BLM's location of the corner is totally dependent on the accuracy of the State highway department's determination regarding the location of his 1/4 corner. There is, however, little or no evidence regarding what the State found at the purported corner or what, if any, resemblance it bears to the original monument described in the 1881 survey field notes. We are simply unable to test the 'bona fide character' of the evidence regarding the State highway department's location of the 1/4 corner. (Survey Manual at 5-11) Moreover, the location of this corner is not supported by other collateral evidence that BLM's south 1/4 corner bears a 'proper relation to known corners' or agrees with the 1881 survey field notes regarding distances to various intervening calls to the east and west. (Survey Manual at 5-9) The monument discovered by the Jones survey is admittedly not the original monument. Appellants also state they were unable to find any evidence of the tree stump described by Neitz and BLM's dependent resurvey makes no mention of that stump. The field notes for the resurvey state: 'There is no remaining evidence of the original bearing tree.'"

Likewise, there was no evidence presented to the Court below to demonstrate the "methodologies" of the State Highway Department.

VIII.

PLAINTIFF'S EXHIBIT D CANNOT BE RELIED UPON BY THE COURT BELOW

On page 20 of its Findings of Fact, Conclusions of Law and Judgment the Court states:

> "Plaintiff's Exhibit D is the most graphicillustration of DOWNER's failure to meet the standard of care. Every one of his own surveys since 1965 differs from the previous one, and every one of his surveys establishes boundaries in Section 9 which are different from the BLM survey." (Emphasis original).

If the discrepancies in Downer's three surveys are the "graphic illustration of DOWNER's failure to meet the standard of care" because they are all different, then the resurvey done by the BLM, in 1985, should have even more significance. The second BLM survey differs by approximately 160 feet to the south and east (2.43 chains x 66 ft = 160 ft). Contrastingly, Downer's placement of the line varies by less than sixty (60) feet. ROA V7, p484-485. Also, the line set forth in by Downer in 1965 was conservative because he "...[D]id not want to put Jacobsen's parcels into any kind of jeopardy by the possibility of claiming more than he was entitled to." (ROA V6, p423-424). Later in the 1980's, with more evidence, Downer placed the line on the line chops.

The same exhibit was used at the IBLA hearing The IBLA stated (97 IBLA at 191, Footnote 9):

> "Bland testified that BLM was concerned with 'inconsistencies' in appellants' evidence o the 1/4 corner because of a shift in appellants location of that corner between the 1965 an 1982 surveys. (citation omitted) Downer

> admitted that the 1965 survey was 'incorrect' [short 30 ft.]. (citation omitted) We cannot find fault with a change of opinion if the change is based on subsequently gained information." (Citations omitted) (Brackets added)

The IBLA, using their administrative expertise, could not find fault with this situation and it is submitted that the Trial Court cannot.

IX.

THE STATUTES

On page 6 of their reply brief, the Hannemans state that Downer did not follow his statutory duty, citing NRS 625.350. No statement of how Downer has failed to comply with the Statutes and no statement of how his failure to comply led in any way to any damages suffered by the Hannemans is set forth. Additionally, there was no allegation or presentation of evidence below regarding Downer's now alleged failure to comply with any state statute. The Supreme Court will not decide a matter that was not litigated or decided by the lower court. See McKay v. City of Las Vegas, 106 N 203.

Not mentioned to date is the 1965 version of NRS 625.340 which reads as follows:

> **"Records of survey: When filing required.** After making a survey in conformity with the practice of land surveying, the surveyor shall, within 90 days after the establishment of points or lines, file with the county recorder in the

county in which the survey was made a record of such survey relating to land boundaries and property lines, which discloses:

xxx

2. A material discrepancy with such record.

3. Evidence that, by reasonable analysis, might result in alternate positions of points or lines."

Downer's map, when compared to the 1881 plat map, shows no material discrepancies.

In Downer's opinion, backed by common sense, no reasonable person, with the information Downer had in 1965, would assume that the north boundary line of section 9 was south of the mining tunnel, when in fact the notes called for it to be north of the mining tunnel.

This statute must be interpreted in light of the facts as they existed in 1965 when Downer was doing his original survey. The trees attendant to the mound in the NW of 9 had not been age of the north boundary of section 4 had not been done.

Downer was guided by the following principles when doing his survey.

1. Reasonable analysis.

2. More convincing evidence.

3. Sec. 562 of the 1947 Manual, which sets out the rules for "determining the limits of lands that were granted according to an official survey o

such land."

4. Preservation of senior rights. The 1881 survey is the senior survey, and the Carter Homestead is the senior right.

5. Harmony in distance, angle and area, with true corners as described in the 1881 plat and notes.

6. Common sense.

Below is a list of discrepancies and assumptions made by Downer in 1965.

ROA V6	401-4	double corners in area
	403	1881 notes accurate
	403	1881 survey done well
	404	double corners
	404	patent 160 acres
	404	calls to Carter station
	406	assumption notes correct
	413-414	location of Bodi Road
	420	Indian allotment 1 mile north
	422-423	line chops
	424	blazed trees
	425-427 and 430	Carter Station
	431	tunnel
	432	BLM position no line chops
ROA V7	439	rejected because of the "accumulative effect of many points with discrepancies similar"

441	SE of 9 to NW of 9 short
442	no line chops to monument
443	line chops in different area attempted to double proportion
444	north of township line
445	more double corners north of township line
446	NW5 Bodie Road matched (BLM adopted wrong monument)
448	NW of 33, 2.7 chains long, 3' west
449	NW of 4 did not fit, pile of rock at potential
449	N township line totally unavailable
449	449 not feasible to double proportion
458	tunnel, clincher
461-2	Law of probability dictated that couldn't use rock piles

In 1965, Downer made an exhaustive search in section 9 and located the SE corner, the E 1/16 of 9 and 16, and the E 1/16 corner, which are shown on the map (Ex.EE).

Adhering to the rule set forth in the 47 Manual Sec. 562, supra, Downer, using copies of the origina

1881 notes and plat, located the topographic calls to Carters and to the "tunnel." He then analyzed all of the above corners and evidence.

The 47 Manual, in Sec. 359 states, "It is a matter of utmost importance to determine where an identified call of the original field notes shall operate to control for both latitude and departure, or for either coordinate by itself..."

The call to "Carters" operated to control the location of the north line of Sec. 9, placing Carters S 12.5° E 16 chains from the section line (1031 ft.) Ex.0 p346. The "tunnel also operated to control the north line, placing it one chain to the north of the tunnel. The SE of 9 operated to control the location of the north line one mile to the north. The E 1/16 between section 9 and section 16 [a point on that line 1/4 of the distance between the corner points] operated to control the location of the north line one mile to the north.

When these four (4) controls were analyzed they all agreed together upon a location for the north line of section 9 with only about one-half chain of variation from each other.

Upon applying the record measurements from the four widely separated points, and finding that they all agreed closely in the location of the north section line, it is apparent that the laws of

probability preclude any other location.

There were no found monuments that upon "reasonable analysis might result in alternate positions of points or lines." The two monuments tied to by the Highway department, in 1919, could not possibly qualify under a reasonable analysis, being hundreds of feet at variance with the record calls and distances as described in the official 1881 plat and notes. They totally fail the requirements of section 562 of the 47 Manual for locating the boundaries of lands "granted according to the official survey of such lands."

As accurately demonstrated in his briefs, with the information that Downer possessed in 1965, no reasonable analysis could have placed the northern boundary of section 9 where the BLM placed it in 1982 or 1985.

X.

MEASURE OF DAMAGES

Assuming arguendo that Downer is liable to future purchasers, then Downer adopts the measure of damages as set forth on page 8 and 9 of respondent, Jacobson's answering brief.

Additionally, Downer adopts the statement of the law as set forth on page 17 in Respondent/Cross-Appellant, Hannemans' Reply Brief to Robert C. Downer's Opening Brief for the proposition that if

any damages are awarded against Downer, and they are not limited to the purchase price of the vacant lot transferred by Jacobsen to Fraiser, they should be limited in amount to the price paid to Fraiser by Swenson. This argument is based on the fact that, as demonstrated by Hannemans, Fraiser had an independent duty prior to selling the property to determine the true boundaries of the land he sought to sell. This independent duty supersedes any duty that Downer may have had to subsequent purchasers.

XI.

DUTY TO PURCHASERS

In 1966, Downer Engineering entered into an oral contract with Stoddard Jacobsen to survey a portion of his property. This survey was completed in 1966. Approximately eighteen (18) years later, Jacobsen, the Hannemans, and the Swensons seek to hold the defendant Downer liable pursuant to this contract and the work done thereunder.

The existence of a duty to a particular person is a question of law:

> "The determination of any question of duty-that is, whether the defendant stands in such relation to the plaintiff that the law will impose upon him an obligation of reasonable conduct for the plaintiff-has been held to be an issue of law for the court rather than for the jury, to be determined by reference to the body of statutes, rules, principles and procedures which make up the law." 57A Am Jur

2d, Negligence, §86.

> "In fixing the bounds of duty, not only logic and science but also policy play an important role, for, as it has been said, the imposition of a duty is an exercise of judicial policy making. A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." Id. §87

Downer did his work for Jacobsen who then sold the property. Negligence will not lie in this situation.

> "But no duty of care arises from a vendor-vendee relationship." Weggen v. Elenn-Parker Elec. So. (SD Iowa) 510 F Supp 252.

If Jacobsen owes no duty of care to the vendees then neither does Downer.

> "Traditionally, the general rule has been that no cause of action in tort can arise from the breach of a duty existing by virtue of contract unless there is between the defendant and the person injured what is termed 'privity of contract.'" 57 Am Jur 2d, Negligence, § 122

Admittedly, this general rule has decreased in effect in recent years. However, in like situations and after the passage of a number of years, liability has been terminated.

Recovery for improvements to real property i

limited to, at the most, twelve (12) years after construction, with or without privity of contract. If this survey is considered to be a construction or improvement to real property, the longest time that Downer could be liable under any theory is twelve (12) years. See Nevada Revised Statutes 11.203, 11.204 and 11.205. Because Downer's services are akin to those covered under the above statutes, policy considerations should help this court find that no duty exists.

> "Liability for negligent conduct may only be imposed where there is a duty of care owed by the defendant to the plaintiff, and where there is no legal duty there can be no actionable negligence." 57 Am Jur 2d, Negligence, §89.

XII.
CONCLUSION

The Court below expressed its reasoning for determining that Downer's conduct fell below the standard of care by pointing to specific conduct and assumptions by Downer. Downer has demonstrated that his conduct and assumptions are set forth in the Manual of Survey Instructions or supported in 97 IBLA 182. The methodology for a potential resurvey is expressly set forth at 97 IBLA at 220. Downer did exactly that in 1965 (See Downer's Opening Brief, p24-26). Nowhere in the 47 Manual is the substantial evidence test for monument identification even

mentioned. Downer cannot be held negligent because of the imposition, years later, of that standard.

DATED this 25 day of January, 1993.

THE LAW OFFICES OF

DANIEL R. WALSH

By /s/ Jon M. Yaple

Jon M. Yaple,

C: downer/appeal/final

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDON HANNEMAN and PATRICIA

No. 23434

HANNEMAN, HUSBAND and WIFE

Appellants,

vs

ROBERT C. DOWNER, MAXINE V.

SWENSON, and STODDARD JACOBSEN,

Respondents.

_____/

ROBERT C. DOWNER,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA

HANNEMAN, HUSBAND and WIFE;

MAXINE V. SWENSON; STODDARD

JACOBSEN,

Cross-Respondent

_____/

MAXINE V. SWENSON,

Cross-Appellant,

vs.

ELDON HANNEMAN and PATRICIA

HANNEMAN, HUSBAND and WIFE;

ROBERT C. DOWNER; and STODDARD

JACOBSEN,

Cross-Respondents.

_____/

CROSS-APPELLANT/RESPONDENT/CROSS-RESPONDENT

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GLOSSARY

According to Cross-Appellant Downer

1/4 CORNERS

A point on a section line and is one-half the distance between the mutual corners of two sections.

1/16TH CORNER

A point on/off of a section line. If on a section line, it is 1/2 the distance between the 1/4 corner and the corner.

If inside a section, it is 1/4 the 80 chain distance north/south and/or east/west.

ALIQUOT

An aliquot part is 1/2, 1/4, 1/8, 1/16, 1/32 or 1/64 of a section and is square.

BEARING

Direction the compass points.

BEARING TREE

Marked tree near a corner of 1/4 corner.

BLAZED TREE

Specially marked tree on the section line.

CALL

Measurement of distance and angle to an object from a monument or point on a line.

CHAIN

A surveying tool used for measuring distance. (one chain = 66 feet; 80 chains = 1 mile)

DEPENDENT RESURVEY

"A dependent resurvey is an official re-marking of the original lines upon a plan whereby existing

evidence of the original survey is given primary control over the position of the lines to be reestablished." (Ex. DD pg 410)

DOUBLE PROPORTIONANT METHOD

Same as the proportionant measurement but points in a north/south direction as well as an east/west direction are used to establish a point. This point will be a corner.

IBLA

Interior Board of Land Appeals. Administrative quasi judicial hearing board for federal land disputes.

INDEPENDENT RESURVEY

Takes into account the original survey but puts the rights of property owner paramount.

LINE

The boundary between two sections.

LINE CHOPS (CHOP LINES)

Axe cuts on trees near or at the section lines.

PROPORTIONATE MEASUREMENT

A means of placing a section line whereby a measurement is taken from the nearest found adjacent corners on either side of the lost corner and the ratio of the distance between them is used to determine the line.

RETRACEMENT

Method of dependent resurvey following original survey.

SECTION

The units that make up a township. They are one mile square which is 640 acres.

TOWNSHIP

A six mile by six mile square area containing 36 sections(36 square miles).

TRAVERSE

To go from point A to point B in a series of straight lines of different bearing;

METHODOLOGY TO DETERMINE ORIGINAL CORNERS

"Original survey lines are to be reestablished under a dependent resurvey by recovering or restoring the original corners by any of three methods, in descending order of importance. See generally Manual of Instructions for the Survey of the Public Lands of the United States, Technical Bulletin No. 6, BLM, 1973 (Survey Manual) at 5-1 through 5-46. First, corners can be recovered by finding evidence of monuments or accessories which 'agree with the record in the field notes of the original survey subject to natural changes' (Survey Manual at 5-6). In the case of 'material disagreements between the particular evidence in question and the record calls,' which cannot be accounted for by natural changes, the Survey Manual sets forth guidelines to follow in determining which features to eliminate as doubtful:

(1) The character and dimensions of the monument in evidence should not be widely different from the record.

(2) The markings in evidence should not be inconsistent with the record.

(3) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.

> Allowance for ordinary discrepancies should be made in considering the evidence of a monument and its accessories. No set rules can be laid down as to what is sufficient evidence. Much must be left to the skill, fidelity, and good judgment of another and the relation of all to the recorded natural objects and items to topography." Jacobsen and Downer v.BLM, 97 IBLA 182, 185.

ISSUES ON APPEAL

1. Did Downer's actions in 1965 fall below the standard of care of a licensed surveyor in Nevada?

2. What effect do the decisions from the IBLA have on this Court's interpretation of the evidence.

3. If Downer's conduct fell below the standard of care, whom does his duty encompass?

4. If Downer did have a duty to subsequent purchasers and his conduct fell below the applicable standard of care, what is the measure of damages to each subsequent purchaser?

STATEMENT OF THE CASE

I.

CROSS-APPELLANT DOWNER'S STATEMENT OF THE CASE

A. BACKGROUND

This case involves potentially confusing information concerning the methodologies and terminologies used by surveyors in determining boundaries to lands. A few basic facts set forth hereunder will greatly aid the Court in understanding the factual information to be supplied later. Additionally, a Glossary of terms has been supplied to assist the Court.

6	5	4	3	2	1
		...			
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

The United States, in the West in 1881, used a rectangular surveying system. Under the rectangular surveying system, sections* are laid out in a six (6) section by six (6) section square as shown above. Each section is thus ideally one (1) mile square

(640 acres) (ROA V4 p99) (80 chains* on a side, RO V4, p173). Each township* contains thirty six (36 sections. In the 1800's the surveyors first surveye the township boundaries (the 6 mile by 6 mile boundar of the township). Later surveyors came in an sectioned the township. They would begin in th Southeast corner of the township (Section 36) an proceed North and West until they completel delineated all of the sections within the township It was normal for there to be some discrepancie when the surveyors reached the northern and th western parts of the township, either because th township line* was not exactly 6 miles by 6 miles o because mistakes had been made in sectioning th township. These mistakes were to be corrected i the northern and/or western tier of sections a needed (Jacobson and Downer v. BLM, 97 IBLA 18 p220, hereinafter ROA Ex.2). The surveyors place monuments at the intersection of the section corner and also marked 1/4 corners* of the sections. Th surveyors were to measure the section lines on th true North and the true East/West compass point (ROA V4 p100). Because of the nature of the survey the northern boundary of a section is the same a the southern boundary of the section above. Therefor the Northwest corner of Section 9 is the Southwes corner of Section 4.

The Bureau of Land Management (BLM(is charged with resurveying these sections if, among other things, there are disputes concerning a boundary line that involves federal property.

II

FACTUAL BACKGROUND

This case involves a dispute as to the boundary between Section 4 and Section 9 in Township 11 North Range 21 East, Mount Diablo Meridian (T.11N.R.21E.MDM) (See grid supra). Prior to any government surveys in this area, William Carter moved in and built a house and out buildings in an area that would later be mapped out as Section 9 of T.11N.R.21E.MDM. Carter's barn was built north of a ravine that ran through the property while the house was built south of the ravine (ROA Ex.2 p196; Ex.00).

In or about 1881 the surveying team of Stewart and Conkling conducted a survey of the internal sections of T.11N.R.21E.MDM (ROA Ex.0). Stewart and Conkling began in the lower right hand section and proceeded North and West as was the normal procedure (ROA Ex.0). The survey was completed and approved by the United States government.

In 1882 Carter received a homestead patent on the lands that would later devolve to Stoddard Jacobsen and thence, through him, to the other parties to this lawsuit (ROA Ex.V). That patent specifically

granted Carter one hundred sixty (160) acres.

In or about 1965, Cross-Appellant, Robert C. Downer, contracted with Respondent, Stoddard Jacobsen, to survey a portion of that 160 acre parcel which had originally been granted to Carter by President Hayes. Its northern boundary (which is the boundary line in question in this lawsuit) is the line between Section 9 and Section 4. (ROA Ex.A) Downer used the following steps in conducting his determination of that northern boundary.

A. INFORMATION GATHERING

The information gathered by Downer included all the documents from the BLM (ROA V6 p398). Downer bought the plats and asked for all of the surveys done in T.11N.R.21E.MDM. No one at the BLM told him that this Stewart and Conkling survey was suspect (ROA V6 p399). Downer obtained the notes and plat for T.12N.R.21E.MDM (ROA V4 p40) and also the material from a survey done by Reppert in or about 1913 (ROA V6 p400), and the State Highway Department layout sheets (ROA V6 p400). Downer went to the Douglas County Court House to check on other private surveys (ROA V6 p400). Downer also used the 1947 Manual of Instructions for Surveying of Public Lands (ROA V6 p401).

As part of his information gathering, Downer relied upon information about the area that he had

known of previously. In 1935 through 1942, Downer worked for the Highway Department (ROA V6 p390). During that time he was made aware of the potential for double corners in the area (ROA V6 p391-392). The Reppert notes (Ex.L), a 1913 survey, also state that there are double corners near the area (ROA V6 p401, Ex.L p11). Downer assumed the 1881 survey was fairly accurate with perhaps a half chain sloppiness in a mile (ROA V6 p402). The Reppert survey reinforced this assumption. (Ex.L, p10; ROA V6 p402 L19 and p403). Specifically at L7, "The corners found are well marked and identical with the corners as described in the old field notes. In nearly every case the topographical features of the land substantiate the location of these corners." Also see Ex. L p11; ROA V6 p403, L19: "Considering the rough mountainous nature of the business (sic) [should read "country"] within the township the bearings* and distances might be considered above average of those found in most of the older surveys."

B. ADDITIONAL ASSUMPTIONS MADE BY MR. DOWNER

(1) Mr. Downer assumed that Carter owned 480 acres (ROA V6 p406). (2) He assumed that the 1881 notes were essentially correct (ROA V6 p 406). (3) He assumed that the 1881 plat was correct (ROA V6 p406-407). (4) He assumed that there were 80 chains in the north/south distance of Section 9 (ROA

V6 p407). (5) He assumed that there were approximately 80 chains in the east/west distance of Section 9 (ROA V6 p407). (6) He assumed that any errors in the north/south direction within the township would be taken care of in Section 4 (the northern section) (ROA V6 p407). (7) He assumed that any error in the east/west direction would be taken up in the western most section (ROA V6 p407). (8) He assumed that if there were line chops*, they would fall on the section lines (ROA V6 p423).

C. PROCEDURE ON THE GROUND

Armed with these assumptions, Mr. Downer engaged in the following procedure on the ground. He began his survey at the southeast corner of Section 9 (SE9). He used it because, in his opinion, it was a good corner (ROA V6 p409). Reppert had used the same corner as a good corner in 1913 (ROA V6 p409). The BLM also used that same corner in their 1982 survey (ROA Ex.2 p187). The description of that corner was quite similar to the original 1881 description (ROA V6 p410). Mr. Downer then went west on the southern section line of Section 9 and came to a monument delineating the east 1/16th corner*. It was 12 feet off the record distance (ROA V6 p417). The 80 acres in the southeast corner of Section 9 were an Indian allotment (ROA V6 p416). Downer also found an Indian allotment post that was

1/2 mile north of that east 1/16th point (ROA V6 p417). These were important points because they also marked the eastern boundary of some of Stoddard Jacobsen's property (ROA V6 p417). Both of the above described points were 1308 feet west of the accepted SE of 9 (ROA V6 p416, 419). He then used the highway to traverse* one mile north of the southeast corner of Section 9 (ROA V6 p420) (This is the northern boundary of Section 9 claimed by Downer). Downer then found the monument that the government claims is the N 1/4 of 9 (N1/4 of 9) (ROA V6 p422) (the Highways' 1/4 corner). Downer found line chops in certain areas during his survey (ROA V6 p422). The Interior Board of Land Appeals (IBLA*), in ROA Ex. 2 p215, found this evidence "worthy of note." The line chops were 25 or 30 feet north of the 80 chain distance (ROA V6 p423).

Downer determined that the Highway's 1/4 corner did not match the distance or calls*. It did not match the distance to Carter's as called on the 1881 notes and plat (ROA V6 p425-426). The call was 16 chains (16 x 66 ft = 1056) (See Ex.0, p346). The monument was only 800 feet from Carter Station by Downer's 1965 measurement (ROA V6 p427). The distance and angle to Carter Station was in drastic disagreement with official notes (ROA V6 p430). Downer drew a line eastward from the Highway's 1/4 corner on the

bearing that appeared in the 1881 survey notes. That line was south of a tunnel cited in those notes (ROA V6 p431-432). In the 1881 notes, the line is denoted as north of the tunnel (ROA Ex.0 p346). There were no chop lines or blazed trees* and no evidence of bearing trees* near this 1/4 corner (ROA V6 p432). A good outline of Downer's procedure is contained in ROA V7 p434-437. The above mentioned inconsistencies raised a substantial doubt in Downer's mind (ROA V7 p439). Ultimately, Downer rejected the Highway's N 1/4 of 9. Downer's opinion was not formed immediately but after analyzing the "accumulative effect of many points with discrepancies similar" (ROA V7 p439).

Downer then went to the Northwest corner of Section 9 (NW of 9) (SW of 4). Downer found the mound which was later adopted by the BLM (ROA V7 p439). He compared the location, size and distance of the bearing trees to the 1881 notes (Id). None of these matched (ROA V7 p441) (EX.0, p345; Ex.TT). Downer also measured the distance north to this mound from the known SE of 9. That distance was several chains short of the record distance (ROA V7 p441; Ex.0, Ex.G). There were no line chops leading to the monument (ROA V7 p442). Line chops were found approximately 190 feet north. They were a

continuation of the chops that were north of the N 1/4 of 9 (S 1/4 of 4) (ROA V7 p443). Downer also found line chops about 160 feet west of this monument (ROA V7 p443). Downer also determined that the use of these points would cut a significant portion of the 160 acres belonging to Carter's original patent (ROA V7 p459). This evidence contributed to his suspicion that this monument might not be the correct corner (ROA V7 p443).

Mr. Downer could not find a marker for the NE corner of 9 (ROA V7 p461). Neither the Jones survey (1981) nor the government BLM survey (1982) found an original monument denoting the NE of 9 (ROA Ex.2 p187, first paragraph).

With this doubt as to the authenticity of the monuments, Mr. Downer determined to do more investigation (ROA V7 p439). He attempted to use the double proportionate method* to find the original monuments (ROA V7 p443). Downer went North to the township line to try to find reliable points to use in determining the north line of 9 (ROA V7 p444). Downer found two piles of rock near where he assumed the NW of 4 would be (ROA V7 p444). One had bearing trees. He then went along the section line and he found double sets of corners all along the line (ROA V7 p445). In the northwest of Section 5 Downer found three piles. The calls to the Bodie Road from

two of the piles were very close to 3 chains. From the third pile it was 6 chains (ROA V7 p446). Downer subsequently traveled to the NW of 33, (this is in the southern most section in the township directly to the North, Township 12 (ROA Ex.BB)). He accepted the NW corner of 33 as a good monument (ROA V7 p447) (BLM also accepted this monument). Downer then measured from that monument to the monument with the bearing trees in the NW of 4 and found that it was 3° off and 2.7 chains too long (ROA V7 p448-449). Placement of those bearing trees, in relation to the monument, did not comport with the original 1881 notes (ROA Ex.2 p210). In Downer's opinion it was therefore impractical to try to double proportion to find the northern line of Section 9 because there were no reliable corners in any direction (ROA V7 p449).

After Downer had gathered all the information concerning the position of the monuments near the NW of 9 and the N1/4 of 9, he formed an opinion, and rejected these monuments because they did not agree with anything (ROA V7 p452). The facts that solidified Downer's rejection of the monuments in the northern area of Section 9 are summarized in ROA V7 p447-449 and 459-465.

Downer then decided to use the calls and distances in the 1881 notes (ROA Ex.0) and the pla

map (ROA Ex.G) to determine the northern boundary of Section 9 (ROA V7 p465). Downer adjusted and checked his determination of the north boundary of Section 9 with the calls and distances n the 1881 notes and plat (ROA V7 p466). Downer used the SE of 9 as a starting point because he felt it was a definite corner (ROA V7 p450) (The BLM also used this corner to begin their 1982 survey (ROA Ex.N). The three principle facts from the notes that he relied on to check his accuracy were (1) the distance north from the SE of 9; (2) the distance of the N1/4 of 9 from Carter Station; and (3) the distance of the line north of the tunnel (ROA V7 p455). Mr. Downer compared the calls in the 1881 field notes as they related to the line that he had established. They all fit with reasonable accuracy (ROA V7 p467).

It is on the above procedures, as confirmed by Mr. Downer during later investigations, that the issue of Downer's standard of care must be measured.

D. THE BLM SURVEYS

In 1973 Mr. Forsythe, who would later do the 1982 BLM resurvey, was directed by the BLM to survey the north line of T.11N.R.21MDM (S. line of T.12) (N. line of Section 4) (ROA V4 p91). During this survey, Mr. Forsythe accepted the monument with the two bearing trees that Downer had rejected in 1965 as the NW of 4 (ROA V4 p94, p96-97 and p103). The

bearing from that monument to the NW of 33 was 3° to the west, instead of due north, and 2.72 chains longer than it should have been (ROA V4 p98). Mr. Forsythe also accepted as the NW of 5, the mound that was 6 chains from the Bodie Road instead of 3 chains as called out in the 1881 field notes (ROA V4 p446).

In or about 1980, the Vita Grande mine conducted a survey in Section 4 (the section just North of Section 9) (ROA V4 p22). This is referred to as the "Jones survey". The Jones survey adopted the markers previously rejected by Downer as the correct monuments for the northern boundary of Section 9 (south boundary of 4). Downer and Jacobsen became aware of this survey and determined that the BLM should be asked to come in and do a survey to settle any questions (ROA V4 p22). In or about 1982 the BLM, under the direction of Neil Forsythe, did a survey of the area (ROA V4 p22). The BLM instructions however were to survey Section 4 (ROA V4 p162) the southern boundary of which is by definition the same as the northern boundary of Section 9. The BLM's survey was a dependent resurvey* (ROA Ex.2 p182). It began at the SE of 9 and went up to the NE of 9 (SE corner of 4). At the NE of 9 they accepted the corner that Jones had established. They accepted the monument that had been rejected by Downer as the N1/4 of 9

They also accepted the second monument that Downer had rejected as the NW of 9.

After Forsythe completed the BLM survey, Mr. Downer protested that survey. A hearing on this issue was held before the IBLA in June of 1985. Prior to that hearing, Mr. Downer went out and did extensive ground work in the area to prove that his survey was correct. The results of much of his work are contained in Exs.BB, EE, FF, JJ, MM, TT and UU. After a hearing and a series of administrative appeals, the IBLA found that the BLM survey was to be followed.

Mr. Downer appealed this determination to the United States District Court in Nevada. Downer's appeal was dismissed based on Downer's lack of standing (ROA Ex.F).

ARGUMENTS

III

DOWNER'S STANDARD OF CARE

Downer is a registered professional surveyor. Under Sorenson v. Pavlikowski, 94 N. 440, 443, 581 P2nd 851 (1978), Downer had a duty to use such skill, prudence and diligence as other members of his profession. A professional is no guarantor of the correctness of his work (McCarty v. Bauer, 3Kan 237 (1865).

Thus, this Court could decide that Downer's survey is correct. It also could decide that even

though the survey is not correct that Downer met the applicable standard of care. Mr. Downer's conduct was reasonable in light of the facts as they existed in 1965.

IV

THE COURT ERRED IN DETERMINING THAT DOWNER DID NOT MEET THE STANDARD OF CARE

In the Findings of Fact, Conclusions of Law and Judgment in this case (ROA V4 p703) at page 9 line 15 through page 10 line 13, the court below set forth its reasoning concerning Downer's failure to meet the standard of care.

Forsythe's testimony, as related by the Court on page 9, is based on an erroneous assumption. Forsythe testifies that Downer did not find the monuments (ROA V4 p144, L23; ROA V4 p189). Downer did find the monument which the BLM claims is the NW of 9. He rejected that monument. He also found the monument that the BLM claims is the N1/4 of 9, he rejected that monument as well.

Secondly, Forsythe's testimony applies only to the process of dividing a section into aliquot* parts (ROA V4 p70, L10). Jacobsen was not subdividing an aliquot part. Downer was hired to do a portion that looked like a spear head. For this type of situation, the aliquot method is wrong (ROA V6 p405).

The Court below determined that the next

assumption that Downer made, "the calls and distances in the Stewart and Conkling survey were accurately measured and recorded," fell below the standard of care. . These notes and plat were part and parcel of the patent given to Carter (ROA V1 p164, 165). The Reppert survey, in 1913, referenced other work nearby done by Stewart and Conkling and stated that the work was above average (ROA Ex.L pg11). No one at the BLM told Downer that Stewart and Conkling's survey was suspect. These field notes and plat are considered the primary record of the survey (ROA V1 p80).

Most significant is the following:

> "Moreover, because survey field notes are deemed 'presumptively correct' and must be 'taken as true' until disproved by a preponderance of the evidence, we must initially presume that the figures given in the notes, including those regarding distances, are correct. Sutton v. Mississippi, 7 L.D. 562 (1888)." (Emphasis added) ROA Ex.2 p192).

Thus, the assumption that the calls and distances in the Stewart and Conkling survey were accurately measured and recorded is one that a competent surveyor in Downer's position must make.

The second assumption that the Court finds falls below the standard of care is that Section 9 contains exactly 640 acres (Id. p10, L7). Downer never made a statement that he considered that Section

9 contained exactly 640 acres. Downer states that the surveyor was off as much as 1/2 chain (33 ft.) in a mile (ROA V7 p493). Forsythe conceded that he would also initially assume that the section would have 640 acres (ROA V4 p99). He also conceded that he would assume that the section line is 80 chains long (one mile) (ROA V1 p173). Any deviations from the 640 acre should be taken up in the north and west sections. Section 9 is neither a north nor west section (ROA V4 p138). The IBLA, in ROA Ex. 2 p220 states:

> "Any adjustment to the size of the sections in T.11 N., R. 21 E., should have been made in the northerly tier of sections, thus making sec. 9 a full 640-acre section."

Thus, the Court's enunciated reasons for Downer's failure to meet the standard of care actually support the fact that Downer did meet the standard of care.

V

FORSYTHE IS NOT AN EXPERT, THEREFORE HIS TESTIMONY CANNOT SUPPORT THE RULING OF THE COURT AS TO MR. DOWNER'S LACK OF CARE

Negligence is never presumed, but each element must be proven. Forsythe is not licensed (ROA V1 p58) and thus has never done a private survey in Nevada. Because Forsythe is not a qualified expert in this area he can make no statements concerning

whether or not Downer met the standard of care.

> "Proof of liability for failure to possess or exercise professional attributes required by those undertaking to render expert services in practice of profession or trade requires testimony of a qualified expert where claimed injury and its causes are beyond common knowledge." Estate of Beach, 542 P.2d 994, 125 Cal. Rptr. 570 15 Ced 623, certiori denied Edwards v. Superior Court of California for Eldorado County, 98 S.Ct. 891, 434 U.S. 1046, 54 L Ed 2d 797.
>
> "Ordinarily, the standard of care to be exercised by a professional surveyor can be established only by an expert witness." Paragon Engineering Inc. v. Rhodes, 451 50 2d 274 (ALA 1984).

Therefore the lower Court's reliance on Mr. Forsythe's opinion suffers from a double fault. First, the assumptions that Downer made are required to be made by every surveyor. Second, Mr. Forsythe is not a qualified expert.

VI

THE COURT BELOW DID NOT UNDERSTAND

THE IMPORTANCE OF THE IBLA DECISIONS

On page 2, line 16 of its decision below, the Court below makes the following statement:

> "An understanding of that process [the administrative process] is necessary, and a discussion of the process is included in order to completely understand the background of the current state law claims."

Admittedly the legal gymnastics engaged in by

the IBLA are confounding. At the IBLA hearing, Downer had "the burden of proving by preponderance of the evidence that the lines and corners as determined by BLM in its 1982 dependent resurvey, do not depict the original survey lines (1881)" (Jacobsen and Downer v. BLM, IBLA 84-762 p1).

Therefore, the Administrative Law Judge ordered the BLM to resurvey the area.

> "On the other hand there appears to be so many deviations form the original calls and distances in BLM's resurvey as to cast doubt on its accuracy. Accordingly, I see no alternative but to remand the case to the BLM for resurvey, a solution suggested by the Board's remand decision." Jacobsen and Downer v. BLM, IBLA 84-762, Findings.

Both the BLM and Downer appealed that decision. The Administrative Law Judge's Appellate Panel, by Mullen (ROA Ex.2) did not apply the above set forth standard to the entire survey. It applied a reasonable doubt standard to each monument.

> "A corner will be regarded as lost where the evidence fails to establish beyond a reasonable doubt that monuments or accessories are those set in the original survey, or that the corner had been perpetuated, or that collatera evidence with respect to courses and distance to known corners or intervening topographica and geographical items on line described i the field notes of the original survey identif the original position of the corner." ROA Ex. at 182.

After this decision, the BLM once again appealed stating that the wrong standard had been used. In this appeal the IBLA Judges did determine that the wrong standard had been used. They found that the proper standard was to apply the substantial evidence standard to each monument.

The IBLA then found against Downer's survey, not based on any negligence of Downer but because they concluded that there was substantial evidence to support the position of the BLM's positioning of the NW of 9, the N1/4 of 9, the NE of 9 and the W1/4 of 4.

VII

RES JUDICATA AND COLLATERAL ESTOPPEL AND RELATED PRINCIPLES OPERATE AT THE ADMINISTRATIVE LEVEL

> "The general rule, applicable to judgments, that a prior determination operates as res judicata or collateral estoppel between the parties to the prior proceeding or those in privity with them, but not as to strangers, applies to administrative determination." 2 Am. Jur. 2d, Administrative Law, Sec. 504.

The IBLA hearings determined an interest in real property and were thus in rem proceedings.

> "However, the rule that a judgment is res judicata not only as to issues decided, but as to all issues which the court might have decided, has been said the [sic] apply to a judgment in rem." 47 Am. Jur. 2d, Judgments §1072.

The judgment is conclusive as to privies.

> "Doctrine of res judicata includes not only those who are actual parties to former judgment but also all persons who are in privity with them, that is having a mutual or successive relationship to the same rights of property." AAA Equipment & Rental, Inc. v. Bailey, 384 So.2d 107.

There is no question that the Swenson's and the Hanneman's are in privity with Jacobsen.

> "Privies are such persons as are privies in estate - as donor and donee, lessor and lessee, and joint tenants." Brown v. Fidelity Union Trust Co., 9A 2d 311, 126 N.J.Eq. 406.

Thus the controlling authorities in this case are the Manual of Survey Instructions and the issues decided by the decisions in front of the IBLA, if those issues were decided using a comparable degree of proof.

VIII

THE REQUISITE DEGREE OF PROOF

> "'For there to be an identity of cause of action within the meaning of the doctrine of res judicata, it has been held that the degree of proof required in the second action must be at least as great as that required to support recovery in the first action.... This rule has been applied where the Plaintiff in the first action is required to prove his allegations by 'clear and convincing evidence,' and in the second action by a mere 'preponderance of the evidence.'" 46 Am. Jur. 2d Judgments, See 415

Pursuant to the above reasoning, both the Swenson's and the Hanneman's are bound by the determination of the issues by the court in Jacobsen and Downer v. BLM, 97 IBLA 182.

Because the issues decided in Jacobsen and Downer v. BLM, 103 IBLA 83 (ROA Ex.4) were decided under the substantial evidence test, they are not conclusive in this proceeding.

In Plaintiff's opposition to Downer's Summary Judgment (ROA V4 p558 at pg 3), Plaintiffs made the following statement:

"The law is well settled as follows:

> ...Where, however, a corner cannot be located by clear and satisfactory evidence, the field notes may then be taken as the next best evidence as to the locations of boundaries" 12 Am. Jur. 2d, Boundaries, Section 72, Page 609. (Emphasis added)
>
> "Nevada certainly follows this law." Backer v. Gowan, 73 Nev. 34." ROA V3 p588 at 3.

This is a statement of the law as it existed in 1965. In 1985 the IBLA determined that the corners did not have to be established by clear and satisfactory evidence but merely by substantial evidence. This is a standard and Downer cannot e held to have known in 1965.

IX

THE 1973 SURVEY

At the IBLA hearing, Mr. Downer presented evidence that the northern boundary of Section 4 had been determined erroneously by Mr. Forsythe in 1973 (See supra). Mr. Forsythe at trial denied that there had ever been a problem with the North boundary (ROA V4 p93). (ROA V5 p94) IBLA in ROA Ex.2 at 209-211 discusses that corner. It determined that the corner was not lost, but stated in foot note 35;

> "35/ This decision is in no small part a result of the increased burden of proof of error which rests with appellants regarding this corner. As previously noted, this corner was remonumented as part of a resurvey of a portion to T. 12N., R. 21 E., which was approved in 1973. A party who challenges the results of a resurvey after that resurvey had been accepted has the burden of showing fraud or gross error in the resurvey by a preponderance of the evidence. Crow Indian Agency, 78 IBLA 7 (1983). As noted previously, there is a lesser burden on the part of the appellants for the other corners challenged by them. The dissent does not recognize this legal distinction."

Thus the IBLA noted that there were major problems with Forsythe's 1973 dependent resurvey of the northern boundary of the township.

X

THE LOCATION OF THE BODIE ROAD

The location of the Bodie Road in the area of

the W 1/4 of 4 is very significant (ROA Ex. SS p1-5). Mr. Forsythe made a measurement from what he considered to be the W1/4 of 4 to a road which he called the Bodie Road (ROA V4 p108, L22-109, L21).

Downer determined that the Bodie Road was a different road to which Mr. Forsythe did not measure. The IBLA in ROA Ex.2 at 201, 202 and 208 endorses Downer's placement of the Bodie Road.

> "As has already been discussed there is a clear dispute between BLM and appellants on the location of the Bodie Road however as noted supra, we accept that the travel way depicted in the 1923 plan (appellant's Exhibit Exh. F) is the Bodie Road. Sheet number 7 of the 1923 plan shows the traveled way crossing the west line of section 4." Id. at 208.

Thus the IBLA has already determined that Forsythe's placement of the road is wrong. When questioned concerning his placement of the Bodie Road, Forsythe admitted that if his placement of the Bodie Road was wrong, then his W1/4 corner of 4 is wrong (ROA V4 p111 L16 through P112 L1).

XI

THE FOUR CRITICAL POINTS

There are four points, the location of which critically bears upon the setting of the north boundary line of Section 9. They are: 1) the W1/4 of 4; 2) the NW of 9 (SW of 4); 3) the N1/4 of 9 (S1/4 of 4); and 4) the NE of 9 (SE of 4).

A. THE WEST 1/4 OF 4

In adopting its corner, the BLM assumed that in the 1881 notes the size of the rock was erroneous, the type of rock was erroneous and that the road that they measured to was the Old Bodie Road. All these assumptions were wrong.

On the stand, Mr. Forsythe admitted that if any one of his three assumptions were incorrect, then his placement of the W1/4 of 4 was incorrect.

The 1881 notes state that the stone marking the W1/4 of 4 is 42" x 22" x 20 p107, L14-19; Ex.0 p347). The stone accepted by the BLM in 1982 was 14" x 6" x 4" (ROA V4 p107, L25-108, L5). Forsythe admitted that this stone is not even big enough to qualify as a marker stone under the definitions of the Manual of Survey Instructions (ROA V4 p108).

> "Judge Luoma concluded that 'it seems unlikely the field notes are describing a 6-inch high stone' (citations omitted). We and (sic) note that, in this respect, the BLM stone is 'widely different from the record.' (Survey manual at 5-7)." ROA Ex.2 p205.

The type of stone set down in the 1881 notes is denoted as trachyte (Ex.0 p347). The stone the BLM accepted is denoted as granite (ROA Ex.N p8; ROa V4 p108). However, during the IBLA hearing, Robert E. Jones, consulting geologist for the BLM, stated that BLM's stone was actually trapstone (ROA Ex. 2 p208).

Mr. Robert E. Jones, appellant's consulting geologist, when asked whether a surveyor before 1910 would know the difference between a trychyte stone and a trapstone, stated that from his experience with cadastral surveys, the early surveyors were "very good on their rock identification" (ROA Ex.2 pg 204). These statements, which Downer contends are controlling on the court below and on this court, conclusively demonstrate that the BLM's placement of the W1/4 of 4 is erroneous.

If the 1/4 corner laid down by the BLM is wrong, this entirely destroys their placement of the NW of 9 (SW of 4) (ROA V7 p517). The court concluded in relation to the W1/4 of 4;

> "However we conclude their (sic) the corner [Downers corner] is 'on line' within an acceptable level of tolerance. By contrast, BLM's greater corner is definitely not on line." ROA Ex.2 p208.

> "In any case, the location of the west 1/4 corner of sect. 4 has not been determined such that the accuracy of the BLM's location of the southwest corner [northwest corner of Section 9] can be verified. To the extent that the evidence supports appellant's west 1/4 corner the accuracy of BLM's location of the southwest corner [northwest of Section 9] is thrown into doubt." ROA Ex.2 at 209.

B. THE NORTHWEST CORNER OF SECTION 9 (SW of 4)

Downer found many discrepancies at the NW of 9 (See supra). The final IBLA appellate decision (ROA

Ex. 4 p87) found that BLM's location of the SW of 4 (NW of 9) was supported by substantial evidence.

At this site there were four bearing trees. The Intermediate Appeal Board when considering those trees stated:

> "The four bearing trees found in the field clearly do not conform to the record." ROA Ex. 2 at 213.
>
> "We now conclude, in accordance with the Survey Manual at 5-7, that the nature of the accessories is 'greatly at variance with the record'." Id at 214.

The Board expressed doubt as to the authenticity of that monument and stated;

> "Having this doubt we cannot hold this corner to be 'found' corner. While the character and dimensions of the monument are sufficiently close to the stone described in the 1881 field notes, the stone is small enough to have been moved. None of the bearing trees found by BLM agree with BLM notes on bearing, distance from the corner, or size. The location of the corner and calls on the line from the corner to the <u>southeast corner of 9</u> have wide discrepancies and there is <u>overwhelming evidence of the existence of multiple monuments in the general area</u>." (emphasis added) (ROA Ex.2 at 216.)

C. THE NORTH 1/4 CORNER OF SECTION 9 (S 1/4 of 4)

In the early 1980's Mr. Downer went back and

gathered more precise measurements to support his 1965 placement of the line. In 1982 Downer walked the area with the BLM and told them about the discrepancy in the call to Carter Station (ROA V7 p469). Despite this, the BLM, in its 1982 retracement*, didn't perform that measurement.

At the administrative hearing there was a conflict between the BLM and Downer as to the placement of "Carters". In ROA Ex. 2 at 196 the IBLA stated;

> "However, even more persuasive that the surveyors meant to tie in the barn rather than the house is the fact that the 1881 survey plat (Govt. Exh. 2), (ROA Ex.00) places 'Carters' north of the ravine. BLM asserts that this demonstrates the fact that the surveyors never travelled to Carter's station. Rather we conclude that it demonstrates that the surveyors tied to the barn which was north of the ravine, rather than the house which was south of the ravine..."

This determination places the position of the BLM 1982 1/4 corner over 300 ft. short and at the wrong angle (ROA Ex.FF).

If the BLM in 1982 had followed the call to Carter Station, they would have realized how drastically the N1/4 of 9 deviated from the 1881 notes.

C.(1). THE TUNNEL

The most incredible piece of evidence which demonstrates the blatant errors of the 1982 BLM

survey is the measurement to the tunnel. The 1881 notes place the north boundary of Section 9 at one chain north of this tunnel (Ex.0 p346). The north section line of 9 is a straight line (ROA Ex.0 p346). If a straight line is drawn from the Plaintiff's placement of the N1/4 of 9 eastward on the bearing set forth in the 1881 notes (89°56') (Ex.0 p346) that line passes almost 2 chains south of the tunnel (ROA V7 p545).

The IBLA stated at 97 IBLA 198, "We are unwilling to believe that the original surveyors could not distinguish north from south, however inaccurate they may otherwise have been." Like the IBLA, during his initial 1965 investigation, Downer was unwilling to believe that the 1881 surveyors couldn't distinguish north from south. In fact it doesn't take an expert to realize that there are serious questions concerning the reliability of a survey that consciously makes an error of this magnitude.

D. THE NORTHEAST CORNER OF SECTION 9 (SE of 4)

In 1982 the BLM accepted the corner that the Jones survey had monumented and described as a "careful and faithful perpetuation of the position of the original corner." (ROA Ex.N p3). In 1988 when BLM did its resurvey, they discarded this careful and faithful perpetuation for what they considered to be the true NE of 9 (ROA Ex.M p367). This new location

of the NE of 9 puts the north section line of Section 9 south of the tunnel!!

In finding Downer negligent, the court below relied in part on the fact that all three of Downer's surveys were different. Obviously the Court missed the importance of the fact that the two surveys that the BLM did were also different and that the BLM admitted the error. Downer's surveys differ by less than 50 feet, while the BLM survey differs by over 160 feet (2.43 chains x 66 = 160.38 ft) (ROA Ex.M p367).

Additionally, the BLM resurvey makes Section 4, the northern most section of the township, approximately 640 acres and Section 9, an internal section, approximately 628 acres (ROA V7 p548). This is directly opposite to the general practice in 1881, 1965, 1982 and 1988.

XII

DOWNER'S ASSUMPTIONS AND CONDUCT DURING HIS 1965 SURVEY WERE VALIDATED BY THE IBLA

Until the IBLA Judges substituted the substantial evidence standard (ROA Ex.4), they recognized that they were confronted with a mass of conflicting evidence.

> "Judge Luoma particularly found 'most disturbing' the fact that BLM's resurvey was in 'complete nonconformity to the record calls' (Decision at 12." ROA Ex. 2 p215.

Therefore, they ordered another resurvey.

In 1965 Downer was confronted with the same problem. He had gathered evidence that rendered the monuments he found extremely suspect.

The IBLA gave specific suggestions to the BLM on the manner of conducting their resurvey. These suggestions fall directly in line with Downer's conduct in his 1965 survey. ROA p554, L2 through P557, L9 points this out.

> "Q. Now, I want you to go to Exhibit 2 and turn to page 219.
>
> A. Okay.
>
> Q. Now, I want you to read -- I want you to read the last two sentences on that page where it begin appellants?
>
> A. Appellant's evidence generally supports the accuracy of the 1881 survey. The evidence of discrepancies presented by BLM almost makes the case for a fraudulent survey. The option of conduction and independent resurvey* remains open to the BLM and should be reconsidered--should be considered. (Asterisk added)
>
> Q. So when Mr. Forsythe was saying that the BLM couldn't do an independent resurvey of this area he was incorrect; wasn't he?
>
> A. That Judge seems to feel like that option is open.
>
> Q. Now, I want you to continue reading on page 220.
>
> A. If a dependent resurvey is made the possibility of a double set of corners was established along the Northern Township of Township 11 north range 21 east. During the course of the subsequent survey in Township 1 north range 21 east in the resurvey of Township

12 north range 21 east but not depicted in --

Q. Time out. I think you missed a line or two. Could you being again?

A. If a dependent resurvey is made the possibility that a double set of corners was established along the northern Township boundary of Township 11 north range 21 east during the course of a subsequent survey in Township 12 north range 21 east should be addressed.

Q. Okay. Stop right there. Now, that's the survey they are talking about, the survey that Forsythe made in 1973; aren't they?

A. Yes.

Q. They are saying the possibility that there is a double set of corners up there should be addressed; isn't that correct?

A. That's correct.

Q. That was exactly your position in 1965; wasn't it?

A. Yes.

Q. Would you continue reading there.

A. The change in course of this boundary as depicted in the resurvey of Township 12 north range 21 east but did not depict (sic) in the survey of Township 11 north range 21 east is of concern.

Q. They are still talking about that 1973 survey on the Northern Township line?

A. Yes.

Q. Okay. Could you continue reading?

A. Any adjustment to the size of the sections in Township 11 north range 21 east should have been made in the northerly tier of sections --

Q. Stop right there. Isn't that what you assumed would have occurred in 1965?

A. Yes.

Q. Okay. Continue reading?

A. Thus making section 9 a full 640 acre section.

Q. Isn't that just what you assumed in

1965?

A. That's right.

Q. Okay. Continue.

A. If proportionate measurement* is used to set the corner common to sections 4, 5, 8 and 9, care should be exercised to determine if the corner can more readily -- can be more readily determined using reliable topographical or other evidence set forth in the 1881 field notes. (Asterisk added)

Q. Stop right there. Isn't that exactly what you did in 1965?

A. Yes, sir.

Q. Okay. Continue.

A. Rather than the corner common to section 4 and 5 Township 11 north range 21 east and section 32 and 33 Township 12 north range 21 east which was reestablished in the 1973 resurvey of Township 12 north range 21 east.

Q. Isn't that corner the northwest corner of 4?

A. Yes.

Q. Isn't that the corner that you indicated you couldn't use in 1965 because there were too many discrepancies up there?

A. That's right.

Q. The Judge here is saying don't use that corner if you can avoid it, isn't he?

A. That's correct.

Q. That's exactly what you did in 1965; isn't it?

A. That's right."

Thus the panel judges, who's job it is to decide land survey cases, set forth assumptions and procedures to be followed by the BLM in the resurvey. These were the exact assumptions and procedures that Downer followed in 1965. Under these circumstances

it is impossible for Downer to be found negligent in the manner in which he conducted his 1965 survey. It is only when the IBLA lowers the standard to the substantial evidence test, a standard that did not exist for surveys in 1965, that the 1982 BLM survey is given any credibility at all.

XIII

DOWNER OWES NO DUTY TO SUBSEQUENT PURCHASERS

Assuming arguendo plaintiff's negligence theory has some merit, the plaintiffs must prove that there is a duty owing from the Defendant Downer to the plaintiffs. The only duty assumed by Downer was that duty pursuant to the oral contract for work entered into and completed in 1966. Any duties thereunder are extinguished by the running of the statute of limitations under the contract. After 1970, Downer owes no duty to any person under this contract.

The existence of a duty to a particular person is a question of law:

> "The determination of any question of duty-that is, whether the defendant stands in such relation to the plaintiff that the law will impose upon him an obligation of reasonable conduct of the plaintiff-has been held to be an issue of law for the court rather than for the jury, to be determined by reference to the body of statutes, rules, principles and procedures which make up the law." 57A Am. Jur. 2d, Negligence, §86.

> "In fixing the bounds of duty, not only logic and science but also policy play an important role, for, as it has been said, the imposition of a duty is an exercise of judicial policy making. A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." Id. § 87

Downer did his work for Jacobsen who then sold the property. Negligence will not lie in this situation.

> "But no duty of care arises from a vendor-vendee relationship." Weggen v. Elenn-Parker Elec. Co., (SD Iowa) 510 F Supp 252.

If Jacobsen owes no duty of care to the vendees, then neither does Downer.

> "Traditionally, the general rule has been that no cause of action in tort can arise from the breach of a duty existing by virtue of contract unless there is between the defendant and the person injured what is termed 'privity of contract.'" 57 Am. Jur. 2d, Negligence, §122.

Admittedly, this general rule has decreased in effect in recent years. However, in like situations and after the passage of a number of years, liability has been terminated.

Recovery for improvements to real property is limited to, at the most, twelve (12) years after

construction, with or without privity of contract. If this survey is considered to be a construction of improvement to real property, the longest time that Downer could be liable under any theory is twelve (12) years. See Nevada Revised Statutes 11.203, 11.204 and 11.205.

XIV

ASSUMING ARGUENDO THAT DOWNER IS FOUND TO OWE A DUTY TO SUBSEQUENT PURCHASERS, HE SHOULD BE LIABLE ONLY FOR THE PURCHASE OF A VACANT LOT WITHOUT IMPROVEMENTS

The value of post purchase improvements are not an element of recoverable damages in contract. See Clark v. Sypress Sures Development Co., 516 So.2d 622 (ALA. 1988) dealing with a purchasers actions for breach of contract and breach of warranty respecting real property.

> "A vendor is not presumed to contract in reference to any future condition of the estate which he sells.... Nor can he be understood as contracting for a liability to pay for improvements which rest with the discretion or caprice or folly of the buyer." Id. at 629.

Downer submits that the above statement of the law should be applicable to this situation. Downer surveyed on a vacant piece of property. His damages,

if any, should be limited to the price of that property immediately post survey.

XV

FAILURE TO JOIN IN THE FEDERAL LAWSUIT PRECLUDES RECOVERY

All parties to this lawsuit, except Downer, had the ability to pursue the appeal of the IBLA determination (ROA Ex.F p5). None did.

> "The doctrine of avoidable consequences applies to injuries to property. A person whose property is damaged can recover only those damages that would have been sustained if he exercised such care as a reasonably prudent person would under the like circumstances to minimize the damage. The law will not allow one to sit idly by and see his property damaged or destroyed through forces negligently set in motion by another and then collect damages occasioned by his own failure to make reasonable exertion to arrest such damage or destruction." 22 Am. Jur. 2d, Damages § 544.

The refusal of any other party to pursue the appeal in federal court is a superseding intervening cause that cuts of liability for Downer's alleged negligent conduct.

XVI

AT THE SUMMARY JUDGMENT STAGE, NO PARTY OFFERED ANY EXPERT EVIDENCE THAT DOWNER'S ACTIONS FELL BELOW THE APPLICABLE STANDARD OF CARE

On October 18, 1991 Downer submitted a Motion

for Summary Judgment (ROA V3 p555) and Reply (ROA V3 p616) based, in part, on the claim that he was non-negligent. This was not opposed by any affidavit to the contrary.

> "Where motion for summary judgment of surveyor who was joined a third-party defendant in encroachment suit and alleged to have been negligent in making incorrect survey for defendants was supported by affidavit of one surveyor and affidavit plus subsequent deposition of another surveyor which clearly refuted such negligence by third-party defendant, absent showing by defendants indication that the survey was incorrect and resulted from negligence, they have failed to sustain their burden to prevent summary judgment of showing existence of material fact for trial." Palivoda v. Bruette, 250 A.2d 808.

Therefore, Downer's Motion for Summary Judgment should have been granted as a matter of law.

CONCLUSION

For the above reasons, the Judgment below should be reversed.

DATED this 20th day of November, 1992.

Respectfully submitted,

THE LAW OFFICES OF DANIEL R. WALSH

By /s/ Jon M. Yaple

JON M. YAPLE

Supreme Court, U.S.
FILED

94 221 JUN 27 1994

OFFICE OF THE CLERK

(3)

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
TERM OCTOBER 1994

ROBERT C. DOWNER, PETITIONER

VS.

ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE
AND
MAXINE V. SWENSON, RESPONDENTS

APPENDIX E	A-133
APPENDIX F	A-166
APPENDIX G	A-269

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162 pp

United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

STODDARD JACOBSEN AND ROBERT C. DOWNER
v.
BUREAU OF LAND MANAGEMENT (ON RECONSIDERATION)

IBLA 86-45 Decided July 8, 1988

Petition for reconsideration of Board decision requiring resurvey.

Petition granted; prior decision, Stoddard *Jacobsen v. Bureau of Land Management*, 97 IBLA (1987), overruled in part.

1. Surveys of Public Lands: Dependent Resurveys

The proper standard for the Bureau of Land Management to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

APPEARANCES: Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Dept. of the Interior, Sacramento, CA, for the Bureau of Land Management.

103 IBLA 83

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The Bureau of Land Management (BLM) has requested reconsideration of the Board's May 8,1987, decision in *Stoddard Jacobsen* v. *Bureau of Land Management*, 97 IBLA 182 (1987). In that opinion, a divided panel held that BLM should be required to undertake another resurvey, either dependent or independent, to ascertain the location of the boundary between sec. 4 and sec. 9, T. 11 N., R. 21 E., Mount Diablo Meridian (MDM), Nevada.

> In its request for reconsideration, BLM states:
>
> [T]he majority purports to set forth a new evidentiary test to be used in conducting resurveys of the public lands which contradict the test previously approved by this Board, the 9th [1] Circuit Court of Appeals, and the

> unanimous position taken by the authoritative treatises in the area. The majority further misapplies or ignores the well established rule that survey monuments, when found, control over distances and calls made in the field notes of the original survey.***

1/ Reference was probably intended to the U.S. Court of Appeals for the Tenth Circuit since the petition subsequently quotes at length from *United States v. Doyle*, 468 F. 2d 633 (10th Cir. 1972).

The majority's new rule holds that a surveyor, when conducting a dependent resurvey of the public lands, may not use evidence of an original corner it its correct position cannot be determined beyond a reasonable doubt. The BLM asserts that this burden of proof cannot be practically utilized in dependently resurveying the public lands since the discrepancies inherent in original surveys, most of which were made in the late 19th or early 20th centuries, contain error which would always create some doubt as to their authenticity. [Emphasis in original.]

(Petition at 1-2).

BLM supports the criticism of the above legal standard as set forth in the dissenting opinion to the Board's previous *Jacobsen* decision, in which it is said:

> To determine that a corner is found does not require evidence "beyond a reasonable doubt," terminology used in the 1973 Survey Manual to help define obliterated or lost corners (see sections 5-9 and 5-20). Instead, an existent corner is defined at section 5-5 as "one whose position can be identified by verifying the evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or testimony." Consistent with this definition of an existent or known corner, it is said: "If there is some acceptable evidence of the original location of the corner, that position will be employed." (Emphasis added.) Restoration of Lost or Obliterated

Corners and Subdivision of Sections, (1974 ed.) at 10. See also *Clark on Surveying and Boundaries* (3rd ed. 1959) at 365.

97 IBLA at 182, 223 n.2

That the proper test for determining whether a corner is existent is a "substantial" evidence test is urged by petitioner in approximately five pages of excerpts from such treatises as *Clark on Surveying and Boundaries*, 4th ed. 464 (1976); [2] *Surveying: Theory and Practice*, by Davis, Foote, and Kelly, 5th ed. 586, 587 (1966); [3] The Tenth Circuit's opinion in *United States v. Doyle*, supra, and prior Departmental decisions, such as J.M. Beard, 52 L.D. 451 (1928), and Robert J. Wickenden, 73 IBLA 394 (1983).[4]

2/ "A corner is 'existent' if its position can be identified by verifying the evidence of the monument to its accessories by reference to the description in the filed notes, or located by an acceptable supplementary survey record, some physical evidence or testimony." *Id.* at 464.

3/ "The facts are, however, that their original survey did contain errors and probably rather large ones if it was made

during the era of the compass and link chain. Further complications may be added by directions in the description being given by magnetic bearings and the declination at the time of the original survey being unknown, or by no statement having been made as to whether the bearings of the original survey were referred to the magnetic or to the true meridian. Often large mistakes are made in transposing from one record to another or are present in the measurements of the original survey. Loss of corners, lack of reference measurements, removal or alteration of physical boundaries, conflicting testimony of persons having knowledge concerning the position of boundaries, conflicts with adjoining property, and numerous other factors may add to the uncertainities of the problem. "At any point where the surveyor finds what he regards as positive evidence as to the original location of the corner and this location does not agree with the relocation measurements derived from the description of the property, an monument is set at the originial location and new measurements of angles and distances are made to refer to the mark thus established." *Id.* at 586,587.

4/ "Where the reestablishment of a surveyed corner on a second survey is supported by substantial evidence, a protest not accompanied by acceptable conflicting evidence by principally by hearsay, does not warrant further survey or investigation of the corner." *Id.* at 397 (emphasis in original).

In contrast to the above, it is the case that the only pronouncement connecting the "beyond a reasonable doubt" standard to the degree of evidenceneed to conclude a corner found is the Board's prior decision at issue.

[1] The Board has carefully re-evaluated its

prior opinion and concludes that a new evidentiary standard was improperly set forth therein for determining whether a corner is existent. The petition for reconsideration is therefore granted. [5]

The weight of authority is convincing that the proper standard for BLM to apply in the course of a resurvey is to consider a corner existent (or found) if such a conclusion is supported by substantial evidence. [6] *Robert J. Wickenden*, supra. See also Survey Manual at 5-5; *Clark on Surveying and Boundaries*, 4th ed. supra; *Surveying: Theory and Practice*, by Davis, Foot, and Kelly, supra; *United States v. Doyle*, supra. We so hold the Board's prior decision is overrruled to the extent it is inconsistent here with.[7]

5/ Petitioner has sought reconsideration by the Board en banc. In responding to such requests, the Board follows a procedure similar to that set forth at Rule 35(b) of the Federal Rules of Appellate Procedure. Thus en banc consideration is not required where, as here, after full circulation of the petition and dispositive order or decision prepared by the assigned panel, no member of the Board request a vote on whether the matter

should be considered en banc.

6/ "Substantial evidence" is defined by the courts as "more than a scintilla but less than a preponderance" and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Coleman v. Gardner*, 264 F. Supp. 714, 717 (D.W. Va. 1967).

7/ The dissenting opinion appears to argue that the "substantial evidence" test is unprecedented. As BLM well knows, and hence its petition for reconsideration in this case, the standard enunciated here comports with the agency's own interpretation of the Survey Manual, which it wrote, and the actual manner in which it has consistently applied the provisions of the manual throughout the years in thousands of survey decisions. The entire thrust of the Survey Manual is to recognize corners a existent, rather than lost, if at all possible. The Board's prior decision, requiring proof beyond a reasonable doubt that a corner is existent, understandably caused a stir among survey professionals and BLM management. (It is noted the petition in this case is endorsed by the Director, BLM, and the Acting Assistant Secretary - Land and Minerals Management; Exh. 1, Petition for Reconsideration).

Utilization by BLM of a substantial evidence test for establishing that a corner is existent is not to be confused with the standard of review applied by the Board in adjudicating appeals from survey decisions. The Board has held that a party challenging the correctness of a dependent resurvey must show error by a "preponderance of the evidence." Peter Paul Groth, 99 IBLA 104 (1987). Thus, in an appeal from a survey decision, an appellant may be able to show that its placement of a disputed corner location is supported by substantial evidence. However, as long as BLM's placement of the corner location is also supported by substantial evidence, appellant's showing is to no avail. To prove error in the BLM decision, appellant must demonstrate by a preponderance of the evidence that BLM's placement of the corner is

wrong. Similarly, where BLM has concluded in a dependent resurvey that a corner is lost, appellant may not be heard to say that it can show by substantial evidence that the corner is found. It must establish error in the BLM decision by a preponderance of the evidence.

It is therefore incumbent on the Board to reevaluate the evidence of record in this case as to specific disputed corners employing the proper evidentiary standard. So doing, and for the reasons previously espoused in the dissenting opinion to our prior decisions, the following findings and conclusions are rendered.

SW Corner of Sec. 4

The 1881 filed notes denote corner monumentation for the SW corner of sec. 4 to be by a "trachyte stone 24 x 18 x 12." BLM's 1982 resurvey relies on a trachyte stone measuring 22 by 17 by 9. This same stone was found by the Nevada State Highway Department in 1939. Four bearing trees were found nearby, supporting a conclusion that the foregoing stone represents the original corner monument.[8] The

Board holds BLM's decision as to the location of the SW corner of sec. 4 1/4 Corner Common to Secs. 4 and 9 is supported by substantial evidence.

8/ Jacobsen and Downer argue that all of the bearing trees were moved in 1881, having been dragged to where found from someplace else. Absolutely no evidence was presented in support of this theory. On the other hand, it was established that part of the stump or root system of one of the bearing trees was found still stuck in the ground when the 1982 resurvey was performed. In addition, the University of Arizona Laboratory of Tree-Ring Research was able to conclude that two of the bearing trees were living specimens well into the 20th century and that the blazes on two trees were made in 1881.

1/4 Corner Common to Secs. 4 and 5

Both BLM and Jacobsen and Downer claim to have located the original corner monument for the quarter corner common to secs. 4 and 5. BLM's monument is smaller than the monument described in the original survey and is of a different composition. Nonetheless, Eugene Faust, a cartographer for the State of Nevada, testified that having examined section corners of various kinds for over 35 years, he would clearly accept

BLM's monument as the original corner monumentation, based on markings on the stone and other considerations. Moreover, BLM's monument stands in proper relation to the section corners one-half mile to the south and north. [9] BLM's decision as to the location of the quarter corner common to secs. 4 and 5 is supported by substantial evidence.

9/ It is no longer disputed that the northwest corner of sec. 4 is a found corner as corroborated in BLM's 1982 resurvey. Even under the erroneous "beyond a reasonable doubt" standard, the Board's prior decision concluded the northwest corner of sec. 4 "has been found, regardless of any discrepancies in record calls to know corners." 97 IBLA at 210.

1/4 Corner Common to Secs. 4 and 9

BLM submits that the quarter corner common to secs. 4 and 9 is not locatable by an original corner monument. According to BLM, it is not a lost corner, but an obliterated one whose location has been correctly perpetuated.

The controversy over this corner was discussed by the dissenting opinion in our prior decision.

Therein, it was advocated that the Board should adopt BLM's recommendation that it be allowed to reestablish the corner of secs. 3, 4, 9, and 10 by double proportionate measurement. This procedure would serve to 10 No original corner monument was found by BLM for this section corner during its resurvey. During the hearing below, the BLM official in charge of the resurvey testified that a remonumented corner was reduce the 5-degree deflection in the south line of sec. 4 occurring between the quarter corner and the southeast corner, the principal criticism advanced by Jacobsen and Downer to BLM's placement of the quarter corner common to secs. 4 and 9.

We hereby approve the procedure previously proposed by BLM. Pursuant to the Board's de novo review authority, BLM is directed to re-establish the southeast corner of sec. 4 by double proportionate measurement so as to reduce the deflecting in the south line of sec. 4.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision reported at 97 IBLA 182 (1987) is overruled in part [10] and BLM's 1982 dependent resurvey is upheld on appeal, conditioned on the reestablishment of the southeast corner of sec. 4.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

10/ No original corner monument was found by BLM for this section corner during its resurvey. During the hearing below, the BLM official in charge of the resurvey testified that a remonumented corner was reluctantly accepted: We did not find the corner of 3, 4, 9, and 10. We accepted evidence that was used by other people. We felt that that was not the corner, but we couldn't prove it, so we accepted that**** (Testimony of Neil R. Forsyth at 276).

11/ The prior decision is not overrruled to the extent it

accepted the northwest corner of sec. 4 to be a found corne
See note 9. However, the proper legal basis for such
holding, consistent with this opinion, is that there wa
substantial evidence supporting the conclusion, viz., "a scribe
rock and bearing trees whose blaze marks were age-dated ar
found to have been made at the time of the 1881 origina
survey" (Tr. 366).

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

In footnote 2 of their opinion, the majority states that a corner is "existent" if its position can be identified by verifying the evidence of the monument or its accessories by reference to the description in the field notes, or located by acceptable supplementary survey record, some physical evidence or testimony.

The majority has also pronounced the standard of proof for determining that a corner is existent. It is existent "if such a conclusion is supported by substantial evidence." Under the standard set out in the majority opinion, which will be the standard of proof in all future cases, a corner will be deemed to be existent if there is substantial evidence of the existence of a monument or its accessories by reference to the description in the field notes, or located by acceptable supplementary survey record, some physical evidence or testimony to support that determination. As will be seen,

the standard of proof for the determination that a corner is existent will control in all future cases, regardless of the issue.

The majority opinion is defendable when the standard of proof for an existent corner set out in the majority opinion is applied.

If the only question was whether the corner was existent there would be no problem with the majority opinion. However, it is not that simple. I fear that by winning this case, the Cadastral Survey has set the stage for a number of losses in future contests. A large hiatus now exists between the test for determining if a corner is lost and determining if a corner is existent. For those cases, the previously well-defined single standard no longer exists.

Prior to this decision the burden was on the one claiming that a monument represents the location of the corner. In Elmer A. Swan, 77 IBLA 99 (1983), this Board found sufficient evidence of the existence

of a monument which represented, according to the appellant, the location of the corner in question to require a hearing before an Administrative Law Judge. However, the burden of showing by a preponderance of the evidence that the monument represented the correct position of the corner rested with the appellant. [1] If the standard pronounced in the majority opinion had then been in place, our holding in that case might well have been different. Similarly, there may have been a different result in Bethel C. Vernon, 37 IBLA 226 (1978), and Alfred Steinhauer, 1 IBLA 167 (1970).

The test adopted by the majority in this case should be analyzed in light of the evidence previously needed to support a finding that a

---

1/ The "weight" of the burden previously imposed on a contestant is discussed below.

corner is "lost." In many cases, such as Crow Indian Agency, 78 IBLA 7 (1983), the contestant challenges a BLM determination that a corner is "lost." Under the standard adopted by the majority, the results would have been different.There was substantial evidence of an existent corner. The appellant had produced a monument matching the monument described in the field notes for the original survey. The Cadastral Survey postulated but presented no physical evidence that the monument had been moved. Applying the test for a lost corner, this Board upheld the Cadastral Survey determination that the corner was lost. There was sufficient evidence to raise a reasonable doubt as to the location of the corner. The evidence insupport of the location of the corner at the monument was at least as strong as the evidence presented by the Cadastral Survey in this case, and the Agency arguments were very similar to that now advanced by the Cadastral Survey.

There is a logical basis for continuing to apply the standard set out in *Stoddard Jacobsen & Robert C. Downer* v. *Bureau of Land Management*, 97 IBLA 182 (1987). That basis is found in the Manual of Instructions for the Survey of the Public Lands of the United States, Technical Bulletin No. 6, BLM, 1983 (Survey Manual). As will be seen, the pronouncement in the *Jacobsen & Downer* case was the standard previously applied, and the pronouncement by the majority in this case is new.

When the Survey Manual was written, the authors were careful to accurately define and apply the terms used in that text. A "corner," as that term is used in the Survey Manual, is not a pile of stones or other physical monument. It is a point on the earth's surface which has been identifiedby its relationship to other points on the earth's surface and described by giving distances and bearings from the other points. The authors gave a specific warning that "this terms 'corner' and

'monument' are not interchangeable. A 'corner' is a point determined by the surveying process. A 'monument' is the object of physical structure which marks the corner point." Survey Manual at 5-4.

After establishing the exact location of corners, a surveyor will erect a marker of "monument" at the location of each corner. The monuments are merely a physical record of the surveyor's work. In a resurvey, the surveyor goes into the field and reconstructs the survey previously conducted, reestablishing the locations of the corners established by the original survey. The existence of monuments is clearly an aid in this determination, but should not be the controlling factor.

The portion of the Survey Manual pertinent to this case was written to give guidance and directives to a surveyor performing a "reconstructive" survey. The surveyor must first determine whether the corner previously established can be identified as "existent" by comparing the written record complied

during the course of the initial survey and the physical evidence he finds on the ground. Under the standard applied prior to the holding in this case, the surveyor was able to make a "yes" or "no" decision. The locatin of the corner, as described in the field notes of the original survey or the plat of that survey, was deemed to be "existent" as a result of finding evidence of the monuments erected at the location of the corner and ties to other physical feartures described in the notes and plat. On the other hand, if the location of the corner could not be adequately established by comparison of the information found on the ground to the field notes and plat, it was deemed to be "lost."

The manual gives specific instructions as to how a corner can be determined to be "existent":

> An existent corner is one whose position can be identified by verifying evidence of the monument or its accessories, by reference to the description in the field notes, or located by an accepable supplemental survey record, some physical

evidence or testimony.

> Even though its physical evidence may have disappeared, a corner will not be regarded as lost if its position can be recovered through the testimony of one or more witnesses who have a dependable knowledge of the original location.

Survey Manual at 5-5.

Under the same heading - "Identification of Existent Corners" - the Survey Manual gives further guidance as to what can be deemed to be an "existent" corner:

> An obliterated corner is one at whose point there are no remaining traces of the monument or its accessories, but whose location has been has been perpetuated, or the point for which may be recovered beyond a reasonable doubt by the acts and testimony of the interested landowners, competent surveyors, other qualified local authorities or witness, or by some acceptable record evidence.
>
> A position that depends upon the use of collateral evidence can be accepted only

> as duly supported, generally through proper relation to known corners, and agreement with the field notes regarding distances to nautral objects, stream crossings, line trees, and off-line trees blazes, etc., or unquestionable testimony.

Survey Manual at 5-9.

The Survey Manual requirements for an "existent" corner are specific. The definition of an existent corner and the definition of an obliterated corner are clearly related. The last paragraph of the definition of an "existent" corner and the defintion of an "obliterated" corner are a statement of the information that can be used when determining that an "obliterated" corner is "existent." [2]

The section of the Survey Manual immediately following the section entitled "Identification of Existent Corners" is entitled "The Restoration of Lost Corners." The definition of a "lost" corner, found in this section, contains precise

language setting out the standard for determining that a corner is "lost."

> A lost corner is a point of a survey whose position cannot be determined, beyond a reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position and whose location can be restored only by reference to one or more interdependent corners. [Emphasis added.]

2/ For older surveys, the corner is rarely found to be existent based only on the findings in the field. The corner monument and ancillary monuments are often totally obliterated or partially obliterated. While the relationship between the Survey Manual description of an "existent" and an "obliterated" corner is apparent from the rest of the Survey Manual section on existent corners, the standard of proof for an obliterated corner is no longer related to that for an existent corner. By definition, an obliterated corner must be recovered beyond a reasonable doubt. This raises an interesting question regarding the standard of proof for a partially obliterated corner.

Survey Manual at 5-20.

If the standard adopted by the majority had not been adopted, the inter-relationship between the two definitions could have been easily stated.[3]

If a "lost" corner is one whose position cannot be determined beyond a reasonable doubt, an "existent" corner is one whose position has been established beyond a reasonable doubt. This is no longer the case. The proof necessary for a determination that a corner is "lost" and the proof necessary for a determination that a corner is "existent" are no longer related. Previously, if ther was a reasonable doubt regarding the location of a corner, it was "lost." For an "existent" corner, there can now be a reasonable doubt. The present test only requires that such conclusion be supported by substantial evidence that the monument or accessory is the same as that described in the field notes.[4] There can and will be cases where there is both substantial doubt that the monument or accessories are at the corner. There lies the hiatus.

The writers of the Survey Manual could have easily stated that, for a lost corner, there is no

substantial evidence that the monument or accessory is the same as that described in the field notes. [3] There can and will be cases where there is both substantial doubt that the monument or accessories are at the corner. There lies the hiatus.

3/ I say that there are two. Actually, there are now three. The inconsistency between the standard used by the majority when defining an existent corner cannot be used for an obliterated corner. No explanation is given for overturning the prior determinatin that the southwest corner of sec. 4 was obliterated. In order to reduce the 5-degree deflection, we must assume that this corner is "lost."

The writers of the Survey Manual could have easily stated that, for a lost corner, there is no substantial evidence that the monument or accessory is the same as that described in the original field notes. There was a sound and logical reason for the authors' choice of words. The basis for the standard of proof for a lost corner was in the authors' minds when they gave the admonition that the term "corner" and "monument" are not interchangeable, and is indicated throughout the Survey Manual.

4/ In footnote 7 to its opinion, the majority has stated that "[t]he entire thrust of the Survey Manual is to recognize corners as existent, rather than lost, if at all possible" and has further stated that this position is endorsed by the Director, BLM and the Acting Assistant Secretary - Land and Minerals Management.

I cannot disagree with that statement. My concern in this case is not directed to this concept. In order to reach their conclusion, the majority have treated a corner and a monument as being synonymous. There is no question that a monument exists in this case. A question still remains as to whether the monument is at the corner. Thus, there is still a reasonable doubt that the corner and the monument are at the same point.

A monument is a physical object which can be intentionally or accidentally moved or obliterated during the time between the original survey and the resurvey. By stating the "uncertainty" necessary for finding a corner to be lost, the authors of the Survey Manual gave the Cadastral surveyor sufficient latitude to reject a monument when there is a reasonable doubt that a monument is at a corner. Under the test now adopted by the majority, a surveyor will be required to defend his determination that a corner is lost by overcoming substantial evidence that the monument or accessory is that same as that described in the field notes. A showing that there is a reasonable doubt that the monument represents the corner is not longer sufficient to overcome physical evidence of a monument.

It may be that the Cadastral Survey and the majority have equated the term "beyond a reasonable doubt" to the degree of certainty necessary for a conviction in a criminal trial. This is not the case. The standard applied in a civil matter such as this is lower than for a criminal proceeding. See generally 30 Am. Jur. 2d § 1168 (1967) and citations therein. The burden of proof required to overcome a reasonable doubt that a monument represents the location of a corner has also been stated by

this Board in previous survey cases. In *Elmer A. Swan*, supra, we stated that the proponent of an existent corner must show that the corner is not lost by presenting clear and convincing evidence.

A surveyor no longer has the latitude he once had. He can no longer reject a monument that matches the one described in the field notes when he has a reasonable doubt that it represents the corner. If there is substantial evidence of the existence of a monument or accessory the corner will be considered "existent." The sword cuts both ways. A surveyor can no longer show, for example, that the calls in the field notes do not sufficiently match the location of the monument or accessory within a reasonable tolerance, thus creating a reasonable doubt that the corner is at the monument. [5] If a contestant

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5/ The factual basis for the majority holding should be carefully examined, with special attention being given to a comparison of the evidence set forth in the majority opinion (including footnote 8, to the evidence set out in *Stoddard* Jacobsen & Robert C. Downer v. *Bureau of Land Management*, supra at 211-17. This comparison will demonstrate that the discrepancies between the calls and descriptions in the field notes and the evidence found in the field will have no bearing on a determination that the corner is existent unless the party claiming that the corner is "lost" can present evidence to support a theory that the corner has been moved. It matters not that the bearing trees were smaller

shows by a preponderance of the evidence that the corner is "existent," using the standard for such determination set out in the majority opinion, he has overcome the determination that it is lost. A corner cannot be both "existent" and "lost."

The Cadastral Survey argued that a standard of proof set out in *Stoddard Jacobsen & Robert C. Downer* v. *Bureau of Land Management*, supra, was a "new rule." It clearly is not. The "beyond reasonable doubt" language can be found in the definition of a "lost" corner in the Circular on Restoration of Lost or Obliterated Corners and Subdivision of Sections issued by the General Land Office on October 16, 1896. See A History of the Rectangular Survey System (BLM), at 684.

As noted above, the Administrative Law Judge's findings and the prior decision by the Board in this case were consistent with previous decisions. Under the standard applied in prior cases, the Board

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(cont.) than the size stated in the field notes, or that the bearings and distances from the monument to the bearing trees did not correlate with the field notes in any respect, or that the monument was not the right size, the right composition, or marked in the manner described in the field notes. The comparison will clearly demonstrate that evidence indicating that the original survey was "sloppy" or "rushed" is sufficient to overcome gross variances between the evidence found in the filed notes.

held that a party challenging a Cadastral Survey determination that a corner is lost must submit clear and convincing evidence that the corner is existent. [6] They now need only present substantial evidence that the monument or accessory matches the description in the original field notes.

The Cadastral Survey freely admits that numerous discrepancies existed between the ties and physical descriptions in the field notes for the initial survey and the physical evidence found in the course of the resurvey. A review of *Stoddard* Jacobsen & Robert C. Downer v. Bureau of Land Management, supra, should leave no doubt that the facts supported the Administrative Law Judge's findings of fact. Based upon the testimony and evidence presented at the hearing, the Administrative Law Judge determined that the survey was incorrect for certain of the corners because the discrepancies between the physical evidence and the description in the original survey left a reasonable doubt

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6/ In his decision, the Administrative Law Judge found that the Jacobsen-Downer portrayal of the location of the corners more closely approximated the descriptions in the original survey notes, but that there was also a reasonable doubt that the monuments found by them were at the corners. Applying the majority standard, Jacobsen and Downer would have prevailed if the Cadastral surveyor had determined the corner to have been lost.

regarding the location of those corners. Said another way, he was convinced by testimony, the documents admitted into evidence, and his field examination that the corners were "lost," as that term is defined in the Survey Manual. 7/

The Administrative Law Judge's decision was well reasoned and supported by the evidence. It still is. However, the determination now made by the majority can also be supported. There was substantial evidence of the existence of monuments and accessories matching those described in the original field notes, even though there was clearly room for a reasonable doubt that the monuments were at the corners.

At this point, it should be noted that when Jacobsen and Downer challenged the location of the

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7/ Henceforth, an appellant must show by a preponderance of the evidence that a corner is "existent," using the standard of proof set out in the majority opinion. It does not mean that an appellant will have a greater burden than that imposed on the Cadastral Survey in this case, when disputing a Cadastral Survey determination that the corner was "lost." A corner will be deemed to be "existent" based upon substantial evidence of the existence of a monument and/or accessories, even though the ties to the monument and the accessories are sufficiently dissimilar to raise a reasonable doubt that the monument is at the corner.

SW corner of section 4, they claimed that it was "lost." The majority has found the corner to be "existent" because there was substantial evidence of the existence of a monument and bearing trees. As a result, a showing that there is a reasonable doubt, based upon a comparison of the findings in the field to the description of the corner in field notes, will no longer be sufficient to support a determination that the corner is lost. The surveyor must overcome substantial evidence that the monument or accessories match the description in the field notes.

The primary impact of the majority decision is that, in future cases, the standard of proof for an "existent" corner and the standard of proof for a "lost" corner are no longer consistent and if an Administrative Law Judge or this Board must choose between the two, the standard of proof for an existent corner set out in the majority opinion will control. I am sure that this Board will soon see the Cadastral Survey arguing that the standard of proof for an existent corner so strongly urged upon this Board should not be applied because it had determined the corner to be lost.

R. W. Mullen
Administrative Judge

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

4015 WILSON BOULEVARD

ARLINGTON, VIRGINIA 22203

STODDARD JACOBSEN AND ROBERT C. DOWNER

v.

BUREAU OF LAND MANAGEMENT

IBLA 86-45 Decided: May 8, 1987

Appeals from a decision of Administrative Law Judge L. K. Luoma, ordering resurvey of public land: Group No. 599.

Affirmed.

1. Surveys of Public Lands: Dependent Resurveys

A corner will be regarded as lost where the evidence fails to establish beyond a reasonable doubt that monuments or accessories are those set in the original survey, or that the corner has been perpetuated, or that collateral evidence with respect to courses and distances to known corners or intervening topographical and geographical items on line described in the field notes of the original position of the corner.

APPEARANCES: Stoddard Jacobsen and Robert C. Downer, *pro sese*; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

This case concerns the actual location of the boundary between sec. 4 and sec. 9, T. 11, R. 21 E., Mount Diablo Meridian (MDM), Nevada. That line had originally been surveyed in 1881, by T. K. Stewart and G. W. Conkling, deputy surveyors. Substantial disagreement subsequently developed resurveyed by the Cadastral Survey, Bureau of Land Management (BLM), between April 19, 1982, and January 5, 1983. This dependent resurvey encompassed the subdivisional lines between secs. 3 and 4, 4 and 5, 4 and 9, and 9 and 10 of the same township, as a retracement and reestablishment of the lines of the original survey in their true, original corners. Stoddard Jacobsen and Robert C. Downer protested the dependent resurvey, and in a July 5, 1984 decision, the State Director, Nevada, BLM, dismissed the protest. [1] Jacobsen

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1/ The location of the south line of sec. 4, which is also the north line of sec. 9, is of considerable concern to Jacobsen, who is the owner of 160 acres originally patented to William Carter, as a homestead on June 1, 1882, and described as the W 1/2 NE 1/4, E 1/2 NW 1/4 sec. 9, T. 11 N., R. 21 E., MDM, Nevada.

and Downer then appealed to the Board. For convenience, Jacobsen and Downer are referred to as "appellants."

In *Stoddard Jacobsen*, 85 IBLA 335, 342 (1985), we concluded that appellants had raised a "substantial question of fact" whether the dependent resurvey was an accurate retracement and reestablishment of the south line of sec. 4, and deemed a hearing by an Administrative Law Judge to be appropriate. Accordingly, we set aside the July, 1984 BLM decision and referred the case to the Hearings Division, Office of Hearings and Appeals, for a hearing and decision. We stated that appellants would have the burden of proving by a preponderance of the evidence that, as to the location of the south line of sec. 4, the dependent resurvey does not conform to the original survey, and that, upon an adequate showing, the Judge "should remand the case to BLM so that the [line] can be resurveyed." *Id.*

The case was subsequently assigned to Administrative Law Judge L. K. Luoma, who conducted a hearing on June 19-21, 1985, in Reno, Nevada, and on June 25, 1985, in Minden, Nevada. In his September 27, 1985, decision, after summarizing the extensive

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(cont.) The land had originally been surveyed by Downer in 1965.

testimony and exhibits, Judge Luoma concluded that, because "there appear to be so many deviations from the original call and distances in BLM's re-survey as to cast doubt on its accuracy ***, I see no alternative but to remand the case to the BLM for a resurvey." Judge Luoma also concluded that the evidence did not fully support the accuracy of appellants' retracement and reestablishment of the south line of sec. 4.

On October 21, 1985, Jacobsen and Downer filed a notice of appeal from Judge Luoma's September, 1985 decision, and a statement of reasons for their appeal. Essentially, they contend that Judge Luoma should have accepted the accuracy of their placement of the south line of sec. 4. Jacobsen and Downer state that they agree with the decision to remand the case to BLM for a resurvey, but that the resurvey should "confirm reasonably with the calls and distances recorded in the original notes and plat" and cover secs. 4, 5, 8 and 9, T. 11 N., r. 21 E., MDM, Nevada.

On November 4, 1985, the Office of the Regional Solicitor, on behalf of BLM, also filed a notice of appeal from Judge Luoma failed to provide any guidance to BLM on how to conduct another resurvey and that, in such circumstances, it would simply stand by its

original dependent resurvey, which it believed to b supported by a preponderance of the evidence adduce at the hearing. BLM asserts that the accuracy o the original resurvey was demonstrated by actual discovery of the various corners "on the ground, which should be given greater weight than the call and distances in the field notes for the 1881 survey

In the alternative, BLM contends that it shoul be allowed to reestablish the southeast corner o sec. 4, which was not disputed by the parties at th time of the hearing, by the method of doubl proportionate measurement, in order to reduce the 5- degree deflection in the south line of sec. 4, show in the resurvey. This deflection had been considere significant by Judge Luoma, as there was no deflectio in either the field notes or plat of the 1881 survey. In any case, BLM argues that Judge Luoma had erre because the dependent resurvey correctly reestablishe the four corners of sec. 4 challenged by appellants, which corners were used by appellants to establish the accuracy of their placement of the south line of sec. 4, *i.e.*, the south quarter corner, southwest corner, west quarter corner, and northwest corner. BLM also argued that "in most critical points," its dependent resurvey

"comes substantially closer to agreement with the original survey notes than do either of appellant's surveys". [2]

On December 16, and January 21 and 27, 1986, appellants filed three reply briefs to BLM's statement of reasons (hereinafter referred to, respectively, as RB-A, RB-B and RB-C). Appellants contend their placement of the south line of sec. 4 conforms more closely with the record calls, distance and descriptions in the field notes of the 1881 survey than the BLM dependent resurvey, and generally dispute the accuracy of the resurvey. For the most part, the arguments advanced are merely reiterations of those made by appellants during the course of these proceedings.

Appellants also restate the theory regarding the discrepancy between their survey of the south line of sec. 4 and other surrounding section lines, and BLM's resurvey, which will hereafter be referred to as the "double corners" theory. Essentially, appellants' theory is that BLM's resurvey relied on duplicate quarter and section corners found on the

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2/ BLM apparently refers to two surveys (RLS 446 and RLS 2350) prepared by Downer. Two survey maps reflecting the first survey were recorded in Douglas County, Nevada, on May 7, 1965, and Nov. 25, 1966. These were supplemented by a March 23, 1983 map. The second survey was completed on March 22, 1982.

ground which were placed "shortly after completio
of the 1881 survey and submittal of the notes an
plat***[in order to] show a closure on the [northwest
township corner within required tolerance" [3] (RB-
at 1). Appellants contend that in order to achiev
closure, the original corners were partially o
completely obliterated and duplicate corners created
"(A)n effort was made to make the new corners appea
genuine, by moving marked stones, or marking ne
bearing trees." *Id.* Appellants argue that these
"moved" corners do not match the record calls an
distance in the field notes of the 1881 survey,
while the original corners do. Appellants assert
that they have documented nine "moved corners,"
including the four corners disputed herein, which
they claims to have been moved to the southeast by
"similar distances." *Id.* at 7. Appellants theorize
why the nine corners were chosen:

> Apparently, after moving the N.W. cor. Sec. 5, to fit the tolerance to the township corner, the 1881 surveyor felt that he had better move some of the nearby corners to the east and south to insure that the fraud would escape detection. He ended up by moving all of the corners in Sections 4 and 5, except the east line of Sec. 4

3/ Appellants note the surveyors were required by survey instructions to resurvey the township in the event closure could not be achieved, and postulate that they may instead have opted to move the corners. See *State of Oregon*, 78 IBLA 13, 19-20 (1983).

> Beyond these corners, the country became steep and rough and heavilywooded, and inspection was unlikely.

Id. at 8. Accordingly, appellants now contend that the Board should order a dependent resurvey of secs. 4 through 9, T. 11 N., R. 21 E., MDM, Nevada.

On February 12, 1986, BLM filed a motion to strike the two reply briefs received by the Board on January 21 and 27, 1986, because they were not filed within 30 days after service of BLM's statement of reasons on November 20, 1985, as required by 43 CFR 4.414. Even construing the reply briefs submitted by appellants as "answer[s]" to BLM's statement of reasons within the meaning of 43 CFR 4.414, we are not required to strike them. The cited regulation provides that an untimely answer "may be disregarded in deciding the appeal." 43 CFR 4.414. However, we have adopted a fairly permissive approach to consideration of late-filed documents (other than notices of appeal) setting forth the reasons for appeal or responding thereto, in the interest of fairness to the parties and where no prejudice to the parties or the public interest can be demonstrated

See *James C. Mackey*, 96 IBLA 367 (1987). Here, the reply briefs were obviously served to the Regional Solicitor, who has had ample time to respond. Moreover, we can discern no harm to the public interest by virtue of these late filings. Rather, it is appellants who have run the risk that the briefs would not be considered by the Board because they might be received after issuance of a decision. Having received them prior to that time and in the absence of any demonstrated prejudice, we will accept the reply briefs. BLM's motion to strike is denied.

In their notice of appeal, appellants stated an intention to present "one item of significant new evidence." Appellants have made no proffer of that evidence, or indicated how it would significantly affect the outcome of this appeal. We will, therefore, adjudicate the case without that evidence.

[1] We turn, therefore, to the substantive matters on appeal. As we stated in *Stoddard Jacobsen*, supra, at 336, a "dependent resurvey is a retracement and reestablishment of the lines of the original survey in their true, original positions, according to the best available evidence of the positions of the original corners." Original survey lines are to be reestablished under a dependent resurvey by

recovering or restoring the original corners by any of three methods, in descending order of importance. See generally Manual of Instructions for the Survey of the Public Lands of the United States, Technical Bulletin No. 6, BLM, 1973 (Survey Manual) at 5-1 through 5-46. First, corners can be recovered by finding evidence of monuments or accessories which "agree with the record in the field notes of the original survey subject to natural changes" (Survey Manual at 5-6). In the case of "material disagreements between the particular evidence in question and the record calls," which cannot be accounted for by natural changes, the Survey Manual sets forth guidelines to follow in determining which features to eliminate as doubtful:

(1) The character and dimensions of the monument in evidence should not be widely different from the record.

(2) The markings in evidence should not be inconsistent with the record.

(3) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.

Allowance for ordinary discrepancies should be made in considering the evidence of a monument and its accessories. No set rules can be laid down as to what is sufficient evidence. Much must be

left to the skill, fidelity and good judgment of the surveyor, bearing in mind the relation of one monument to another and the relation of all to the recorded natural objects and items of topography.
Survey Manual at 5-7.

Corners which cannot be recovered by evidence of monuments or accessories are regarded as obliterated to the extent that they may still be recovered on the basis that their location has been "perpetuated" or that collateral evidence established their location. *Id.* at 5-9. Such collateral evidence is generally considered to be "proper relation to known corners, and agreement line trees, and off-line tree blazes, etc., or unquestionable testimony." *Id.* Where a corner cannot be considered existent or obliterated, it will be regarded as a lost corner, and restored by the method of proportionate measurement, *i.e.*, reference to two or more interdependent corners, in harmony with the record of the original survey. The Survey Manual also established that the standard to be applied in determining whether a corner can be said to have been found is proof beyond a reasonable doubt. By definition, a "lost corner is a point of a survey whose position cannot be determined, beyond a

reasonable doubt, either from traces of the original marks or from acceptable evidence or testimony that bears upon the original position." Id. at 5-20; see *Stanley A. Phillips*, 31 IBLA 342, 347 (1977). It is not necessary to show beyond a reasonable doubt that a corner is lost. It need only be established that there is a reasonable doubt as to its position.

In conducting a dependent resurvey, all relevant evidence must be considered. *Bethel C. Vernon*, 37 IBLA 226 (1978); *Orion L. Fenton*, 1 IBLA 203 (1971). A dependent resurvey also must comply with the directions set forth in the Survey Manual. *Domenico A. Tussio*, 37 IBLA 132 (1978). An independent resurvey, which would establish new section lines without regard to the original survey, may be resorted to "if there are intolerable discrepancies in the original survey" (Survey Manual at 149). We will generally apply there rules in our examination of the testimony and evidence presented at the hearing to determine if Judge Luoma's decision is supported by the evidence. In an appeal from a decision of an Administrative Law Judge, the appealing party has the burden of showing error by a preponderance of the evidence. See *United States* v. *Connor*, 72 OBLA 254 (1983). It must be kept in mind that with respect to this burden of proof, BLM is an appellant.

Prior to commencing a discussion of the disputed corners, we deem it advisable to generally describe the resurvey in question. The starting point of the resurvey was the corner common to secs. 9, 10, 15 and 16 (SE cor., sec. 9). This corner was accepted by all parties as having been a "found" corner. The survey then proceeded on a course N. 0 degrees 28' E. on the boundary between secs. 9 and 10. The 1/4 corner common to secs. 9 and 10. At the NE corner, sec. 9, no evidence of the original corner was found, but a monument was found which all parties accepted as being "a careful and faithful perpetuation of the original corner" (Govt. Exh. 35, Survey notes of 1982 survey, at 3).

The survey continued on a N. 0 degrees 09' W. bearing on the boundary between secs. 3 and 4. The 1/4 corner common to secs. 3 and 4 was set by proportionate measurement at 38.94 chains, as there was no remaining evidence of the original corner. The survey continued on the same bearing for a distance of 38.82 chains and tied to the corner common to secs 3 and 4, T. 11 N., R. 21 E., and secs. 33 and 34, T. 12 N., R. 21 E.

The survey then commenced at the NE corner, sec. 9, and proceeded on a course S. 84 degrees 48' W. between secs. 4 and 9, a distance of 37.22 chains

to the 1/4 corner common to those two sections. The location of this 1/4 corner was disputed at the time of the hearing. From the 1/4 corner common to secs. 4 and 9, the survey ran at a bearing of S. 89 degree 30' W., a distance of 39.70 chains, to the corner common to secs. 4, 5, 8 and 9 (SW cor., sec. 4). This corner was also disputed at the time of the hearing.

From the SW corner, sec. 4, the survey ran N. 0 degrees 39'W. between secs. 4 and 5, for a distance of 39.88 chains to the 1/4 corner common to secs. 4 and 5. This corner was also disputed at the time of the hearing. The survey then continued on a bearing of N. 0 degrees 43' E., a distance of 40.35 chains, to close at the corner common to secs. 4 and 5, T. 11 N., R. 21 E., and secs. 32 and 33, T. 12 N., R. 21 E., which had been remonumented during the course of a survey conducted in 1972.

No attempts were made to tie to any additional corners.

As noted above, this case concerns the location of the south line of sec. 4, and particularly the location of four disputed corners which were used when locating the south line. [4] For the sake of

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4/ The four "disputed" corners to which we refer are the south 1/4, southwest, west 1.4, and northwest corners of sec. 4.

clarity, we will discuss each of those corners and the related line calls separately.

Quarter Corner Common to Secs. 4 and 9
T. 11 N., R. 21 E., MDM

Corner as described by BLM

This corner is described in the field notes of the 1881 survey (Govt. Exh. 3) as a 4-inch-diameter post set in an earth mound with a 10-inch-diameter pine located 70 links distant, bearing N. 80 degrees W. In conducting its dependent resurvey, BLM did not find this 1/4 corner, but relied on the location of the corner given in a survey (RLS 3740) performed by Jimmy D. Jones and recorded in Douglas County, Nevada, on January 14, 1982 (Govt. Exh. 15). That survey based the location of the corner on a tie to the corner in right-of-way maps of the Nevada

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(cont.) Although on appeal, BLM "offers" to reestablish the southeast corner of sec. 4 in order to minimize the 5-degree deflection in the south line, throughout the proceedings below, the location of this corner was accepted by BLM, appellants, and the witnesses who testified in their behalf. The accuracy of this corner will be discussed, infra. We are mindful of the fact that, by seeking to move the southeast corner of sec. 4, BLM has called into question all of the evidence and testimony in support of its case regarding ties between this corner and the south 1/4 corner, sec. 4.

Department of Highways, which claimed to have "found [the corner] in 1917" (Tr. 82). The field notes of the dependent resurvey specifically state that the Jones survey corner is "identical with the position of the Nevada Highway Department survey tie in 1919 and 1930" (Govt. Exh. 35 at 5). The record contains an April 12, 1919, State right-of-way map (Govt. Exh 5), which gives a specific all to the 1/4 corner.

Neil R. Forsyth, who was in charge of the dependent resurvey, testified that BLM used a call given in the 1917 field notes of the State highway department (Govt. Exh. 6D (Sheet 3 of 4)) gives a specific call to the "found" 1/4 corner. The corner established by the State highway department was also used to describe private land in two deeds, dated August 26, 1919, and November 8, 1940, to the State of Nevada for the purposes of a public highway. See Govt. Exhs. 7, 8; see also Tr. 153-54.

Walter L. Neitz, a registered land surveyor who participated in the preparation of the Jones survey, testified that, in addition to relying on "highway information," an effort was made to locate the original corner monument (Tr. 227-28). The Jones survey found neither a post nor an earth mound, which Neitz felt would have disintegrated over the

years (Tr. 235, 257). Instead, a "small rock pile" was found (Tr. 227). Digging down at that point "about a foot and a half or so," the Jones survey "found the remnants of the old mound, which was about 3 feet or so in diameter and approximately 2 feet high" (Tr. 228). This mound was actually a "rock mound" (Tr. 232). Neitz testified that he did not consider this mound to be the original 1881 monument, but a remonumenting of the corner, which was often done in the case of earth mounds (Tr. 252-53, 257-58). The Jones survey also found the "remains of a tree stump," badly decayed, which was located approximately 67 links distant, bearing N. 81 degrees W., which he considered to be "very close" to the record call for the bearing tree [5] (Tr. 231-33). Neitz described the tree as an "old notched tree," stating that it had "a chop mark on it, but no scratch marks" (Tr. 231-32).

In his September, 1985 decision, Judge Luoma did not accept BLM's location of the south 1/4 corner, referring to the lack of testimony regarding the State highway department's

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5/ Neitz testified that, in most cases, a 1/4 corner would have two bearing trees (Tr. 243). However, he was unable to state whether here were other trees at the time of the 1881 survey which could have been scribed (Tr. 243-44).

"methodologies" and "BLM's reconstruction of a purported monument" (Decision at 7, 12). We also find that there is a definite absence of any testimony regarding how BLM or the Jones survey translated the State highway department right-of-way maps and field notes into a fixed location for the 1/4 corner. Moreover, even assuming that this can be done, [6] the accuracy of BLM's location of the corner is totally dependent on the accuracy of the State highway department's determination regarding the location of this 1/4 corner. There is, however, little or no evidence regarding what the State found at the purported corner or what, if any, resemblance it bears to the original monument described in the 1881 survey field notes. [7] We are simply unable

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6/ Neitz testified that the 1939 State right-of-way map could be used to reestablish the 1/4 corner to "within less than a foot" of the call (Tr. 236-37, 255-56). However, the call was given to the center line of the highway right-of-way and then to the southwest corner, sec. 4, which is also dispute (Govt. Exh. 6D (Sheet 3 of 4); see Tr. 256-57).

7/ Appellants refer to a copy of the State highway department's field notes, dated Nov. 25, 1938 (Govt. Exh. 5C), which they claim describes, in the following notation, the south quarter corner as located by the State: "Mon. rocks, No marks, Probably 1/4." There is no indication in the record that this notation refers to the south 1/4 corner. Assuming it does, the monument is clearly not the original monument described in the 1881 survey field notes.

to test the "bona fide character" of the evidence regarding the State highway department's location of the 1/4 corner (Survey Manual at 5-11). Moreover, the location of this corner is not supported by other collateral evidence that BLM's south 1/4 corner bears a "proper relation to know corners" or agrees with the 1881 survey field notes regarding distances to various intervening calls to the east and west (Survey Manual at 5-9). The monument discovered by the Jones survey is admittedly not the original monument. Appellants also state they were unable to find any evidence of the tree stump described by Neitz and BLM's dependent resurvey makes no mention of that stump. The field notes for the resurvey state: "There is no remaining evidence of the original bearing tree" (Govt. Exh. 35 at 5).

We note that the relevant record of the Jones survey (Govt. Exh. 16 (Sheet 3 of 9)), when describing bearing trees for the south 1/4 corner, states: "None." However, Forsyth testified that BLM had found a tree stump, but that it could not be considered a bearing tree because "there was no scribing on it" (Tr. 266). That tree appears in Government exhibit 71. Nevertheless, appellants also argue that in the area of BLM's purported corner there were other trees which could have also been used as bearing trees in 1881. The fact that they were not undercuts our ability to accept that corner location as 1/4 corners were generally tied to at least two bearing trees. Page 32 of the May 3, 19981, "Instructions of the Commissioner of the General Land Office to the Surveyors General of the United States Relative to the Survey of the Public Lands and Private Land Claims" (1881 Instructions) (found in C. Albert White, A History of the Rectangular Survey System (BLM), which were issued prior to the June 15, 1881, contract under which Stewart and Conkling executed the 1881 survey, provided that, where the requisite number of bearing trees can be found within 300 links of the corner point, "two (2) [bearing trees should be established] for every Quarter Sec. Cor." In addition, page 10 of the June 1, 1864, Instructions

to the Surveyors General of the United States, Relating to their Duties and to the Field Operations of Deputy Surveyors (1864 Instructions) (found in C. Albert White, A History of the Rectangular Survey System (BLM)), provided that, in the absence of the requisite number of bearing trees not less than 2-1/2 inches in diameter, "a pit two feet square and not less than twelve inches deep is required." We note that the 1881 survey notes state that, in addition to the one bearing tree, the surveyors "dug pit 24x18x12 [inches], 8 [links] North." No evidence of this pit was found by BLM or Jones.

Robert C. Downer also testified to the existence of other suitable bearing trees which would have been standing in 1881 "within forty or fifty feet" of BLM's corner (Tr. 376). Lacel E. Bland, Chief of the Reno, Nevada, Branch of Cadastral Survey, BLM, who accepted the dependent resurvey, admitted the possibility of other suitable bearing tress, but testified that he had encountered instances where they were simply not used (Tr. 338-39; see also T. 260). In any case, regardless of whether other trees should have been marked, the record does not establish that the tree stump was the bearing tree referred to in the 1881 survey field notes. The fact that this monument appears at the location of

the State's corner may simply confirm the highway department's placement of a monument as early as 1917 or later, rather than evidence of a remonumentation of the original corner. We cannot conclude beyond a reasonable doubt, that either the rock pile or the rock mound (discovered at an unexplained depth) is a perpetuation of the original monument. See Edward G. McClellan, 11 L.D. 93, 96 (1890); cf. Mr. & Mrs. John Koopmans, 70 IBLA 75 (1983); Rubicon Properties, Inc., A-30748 (Mar 6, 1968).

Quarter corner as described by appellants

Appellants are also unable to point to the discovery of the original monument at the south 1/4 corner. Nevertheless, they argue that they have found evidence of the original bearing tree. Downer testified that he discovered a ten-inch stump, of a pine tree, which had been cut off a foot,

or less, from the ground, the only pine stump in quite a large radius. There is a lot of junipers around there, but there are no other pines within this radius. And all the trees around there are pretty small. This was probably the only tree capable of being blazed at that time. This is the reason why

they did not have two blazed trees.

(Tr. 373-74). He was unable to identify any blaze on the stump because "it was cut off too low" (Tr. 374); see Tr. 513-14, Tr. II 36-37). [8] In accordance with "Instructions to Surveyors General of Public Lands of the United States for those Surveying Districts Established in and since the Year 1850" containing also a "Manual of Instructions to Regulate the Field Operations of Deputy Surveyors, illustrated by Diagrams" (1855 Instructions) (found in C. Albert White, A History of the Rectangular Survey System (BLM)), at page 8, bearing trees were to be blazed in part with the letters B. T. "as near the ground as practicable." Apparently Downer regarded the tree as cut off below that point. By itself, the evidence of the existence of the tree stump, however, does not establish the location of the 1/4 corner where there is no indication that it is the remains of the bearing tree referred to in the 1881 survey field notes. [9] See Vern Johnston Logging Co., A-28760 (Aug. 8, 1962).

Relationship to calls in 1881 survey notes

We turn now to the various related calls along

the boundary between sec. 4 and sec. 9 which both appellants and BLM argue support their location of the south 1/4 corner. Appellants contend that the accuracy of their corner, versus BLM's, is demonstrated by the record distances to an undisputed corner, i.e., the southeast corner of sec. 4. Appellants state that their corner is 18 feet short of the record distance of 2,631 feet, whereas BLM's corner is 187 feet short. Neitz testified that the corner in the Jones survey, accepted by BLM, was actually short by 175 feet, which was acceptable "in that type of terrain" (Tr. 253-54). See Appellants' Exh. D. Neitz testified that the discrepancy in distance was probably due to the fact that the original surveyors were slope chaining, trying to "correct for the vertical differential," rather than level chaining (Tr. 254-55). He stated that, in his surveying experience in rough terrain in northern California, Nevada, Idaho, and Utah, he had found original section corners "as much as four to six hundred feet out of position" (Tr. 255).

8/ The transcript of the hearing proceedings in Minden, Nevada, on June 25, 1985, were separately paginated from the rest of the transcript and, accordingly, will be referred to as Tr. II.

9/ Bland testified that BLM was concerned with "inconsistencies" in appellants' evidence of the 1/4 corner because of a shift in appellants' location of that corner between the 1965 and 1982 surveys (Tr. 323-24). Downer admitted that the 1965 survey was "incorrect" (Tr. II39). We cannot find fault with a change of opinion if the change is based on subsequently gained information.

The 1881 Instructions, at page 20, provide that the "length of every line you run is to be ascertained by precise horizontal measurement." On "uneven ground," the surveyors were required to keep the chain stretched and "horizontally leveled," Id. (Emphasis omitted). And when ascending and descending steep ground, hills, or mountains, the chain was required to be shortened to one half its length (and sometimes more), in order accurately to obtain the "true horizontal measure." Id. at 21; see Tr. II 67-68. There is no evidence that Stewart and Conkling did not horizontally level the chain on uneven ground or generally determine the accurate horizontal measurement. The Survey Manual, at 5-23, also indicates that use of the Gunter's link chain in the early surveys often caused inaccuracies "in measuring steep slopes." However, in the 1881 survey field notes, the terrain is described as "rolling." Moreover, because survey field notes are deemed "presumptively correct" and must be "taken as true" until disproved by a preponderance of the evidence, we must initially presume that the figures given in the notes, including those regarding distances, are correct. Sutton v. Mississippi, 7 L.D. 562, 564 (1888).

BLM also points to a discrepancy as to the south line of sec. 12 between the 1881 survey and a partial subdivisional survey of T. 11 N., R. 21 E., MDM, Nevada, by H. W. Reppert in 1913 (Appellants' Exh. B), particularly regarding calls to a gulch and ridge. See Tr. II at 14-19. However, Reppert did not report finding the gulch described in the 1881 survey field notes and, as noted infra, a ridge is an indefinite call. We are not persuaded by this evidence. In addition, Reppert stated that: "[C]onsidering the rough mountainous nature of the country within this township, the bearings and distances might be considered above the average of those found in most of the older surveys" (Appellants' Exh. B at 14).

In his posthearing brief at page 21 (Downer's brief consists of four documents which have been repaginated sequentially in the case file by the Board for ease of reference), Downer stated that: "The average error of closure in steep country is in my experience less than 30 feet, and many times almost exact, in tracing the old surveyors." We, therefore, conclude that even a 175-foot (or 2.65-chain) deviation from the record distance was enough to raise doubts about the accuracy of BLM's location

of the south 1/4 corner. If the southeast corner i
moved, as BLM proposes, the discrepancy will h
greater.

Quartz ledge

The first call in the 1881 field notes proceedin
westerly from the southeast corner of sec. 4 is
quartz ledge located at 2.72 chains. [10] Downe
testified that he found such a ledge "exactly matchin
the call" (Tr. 378). Forsyth testified that BLM di
not "tie out" at the quartz ledge because that ledg
"and the top of the spur is all about the same plac
in there" (Tr. 265). Downer testified that "ther
is quite a lot of quartz rock here, so that yo
couldn't miss" (Tr. 378). Photographs of this are
(Appellants' Exhs. R and S) do depict a ledge
However, the

10/ The evidence indicates that the term "ledge" referred to
quartz outcrop rather than a vertical face.

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ledge is of little help in locating the 1/4 corne
as it is to close to the SE corner that both the BL
and Downer calls are within reason. It simply doe
not afford a "definite connection" (Survey Manual a
132). See Frank Lujan, 40 IBLA 184, 189-90 (1979)

appeal dismissed, Lujan v. U.S. Department of the Interior, Civ. No. 79-455C (D.N.M. Feb. 11, 1980), appeal dismissed, 673 F.2d 1165 (10th Cir.), cert. denied, 459 U.S. 969 (1982) ("foot of the bluff"). If, however, the corner is moved as the dissenting opinion proposes, this ledge would become important, as it supports appellants' location of the boundary line.

Top of ridge

The next call was the top of a ridge located at 9.72 chains. Downer testified that what he found at that point was "not really a top of the ridge, but a very great change in slope" (Tr. 443). He stated that: "This was very steep, almost like a cliff, up to here (indicating). Then it did level off, but it was actually not the top. It just became a very gentle slope up to some point in between here (indicating), a very flat summit" (Tr. 378). Forsyth testified that BLM found the top of the ridge along its south line at about 5.87 chains (Tr. 265). From Downer's description, it appears difficult at best to discern what the surveyors in 1881 considered the top of the ridge. Therefore, this call also cannot be relied upon.

Tunnel

The next call is to a tunnel located at 19.7 chains (60 chains from SW Cor., Sec. 4) which "bears

south," 1 chain from the line. Downer testified that appellants' south line passed "about 1.3 chains north" of the tunnel (Tr. II 43). Downer also calculated the distance from the south 1/4 corner to the point on appellants' south line immediately north of the tunnel, as being 22.73 chains (Tr. 508). Bland testified that appellants' distance is actually 23.98 chains (Tr. 315). The record distance is 20.14 chains. [11] By contrast, Bland testified that BLM's south line passes "the north edge of the tunnel" (Tr. 97; ss Tr. II 66). Bland and Forsyth testified later that BLM's line was actually 0.15 chains north of the center of the tunnel (Tr. 123, 263-64). Bland, noting that the tunnel "with the overburden is about two chains in length," testified: "[W]e picked about the middle of the tunnel to tie into or where it's caved in" (Tr. 317-18). The point on BLM's south line at the tunnel was 21.40 chains from the south 1/4 corner (Tr. 123; see also Tr. 509).

11/ Downer explained the discrepancy by the fact that the actual call to the point along the south line was given as 60 chains east from the southwest corner of sec. 4, i.e., "to the nearest 10 chains" (Tr. 43). Downer stated that such a call was "not as precise as when they say 16 chains" (Tr. 44). The Survey Manual, at 5-16, states that: "Early field notes often appear to have shown distances only to the nearest chain or even a wider approximation."

We find the evidence regarding the location of the tunnel casts doubt on the location of both the BLM and the Downer 1/4 corners. In one way or another the tie does not match that in the field notes. We find, however, that the measurement from the tunnel to the boundary line between sections 4 and 9 clearly supports the location of the boundary as being closer to that depicted by appellants than that depicted by BLM. [12] Given that it is likely that the surveyors would have tied to the center of the tunnel entrance, appellants' line clearly passes some distance north of that point, whereas BLM's line does not.

Line blazes

Appellants also argue that their south line "passes very old, directional line cuts, made by axes, and a blazed dead tree, undatable due to moisture and decay" (RB-B at 3). Downer testified that he found blazes east of the south 1/4 corner (Tr. 377). However, he did not regard them as "line trees" because they were "not called out in the notes," but considered them to be "blaze trees on line, on or near line" (Tr. II 44). Although there is no mention

of line trees in the 1881 survey field notes, the 1881 Instructions also provide:

> A sufficient number of other trees standing within 50 links of the line, on either side of it, are to be blazed on two sides diagonally, or quartering toward the line, in order to render the line conspicuous, and readily to be traced, the blazes to be opposite each other, coinciding in direction with the line where the trees stand very near it, and to approach nearer each other the farther the line passes from the blazed trees. Due care must ever be taken to have the lines so well marked as to be readily followed, and to cut the blazes deep enough to have recognizable scars as long as the trees stand.
>
> Where trees 2 inches or more in diameter are found, the required blazes must not be omitted. [Emphasis in original.]

Id at 21. Thee is no requirement that these blazed trees be noted in the field notes. Id. at 43-44. Accordingly, appellants' evidence of a blazed tree supports appellants' location of the south line between the southeast and south 1/4 corners of sec. 4. Rules for the Restoration of Lost and Obliterated Corners, 1 L.D. 671, 678 (1883). The location of the blazed tree appears on appellants' exhibit D very near to appellants' south line. See Appellants

Exh. B at 7.

Carer's House or Carter's Station

The next call is to "Carter's House." The 1881 survey field notes state that at a point approximately 3 chains west of the south 1/4 corner the house "bears S. 12-1/2° E. 16 [chains distant]." The record

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12/ One would expect that if there were errors, the errors would be more likely in longer traverses than in shorter ones.

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establishes that the house was actually part of a group of buildings, including a barn, shed, corrals, and various outbuildings, operated by William Carter as a freight station along the Bodie Stage Road, which have been largely obliterated by subsequent road construction. Downer testified that the "southerly foundation of the barn is still visible" (Tr. 375). The location of Carter's station is not in dispute. Downer testified that he established a point 16 chains bearing S. 12-1/2° E. from a point 3 chains west of appellants' south 1/4 corner which fell near the center of the complex of buildings, "between the barn foundation and the known site of Carter's house" (Tr. 454; see Appellants' Exh. F at

6). That point was about 50 feet south of the barn and somewhat north of the house (Tr. 375).

In its posthearing brief (Brief) (Appendix A IV), BLM asserted that appellants' actual tie to "Carter's House" from a point 3 chains west of appellants' quarter corner was S. 19° 37' E., a distance of 16.98 chains. By contract, using BLM's quarter corner, Downer testified that a comparable point would be "230 feet [3.48 chains] south of Carter's house" (Tr. 376; see Appellants' Exh. F at 6). Forsyth testified that with a bearing of S. 14° 18' E. from a point 3 chains west of BLM's south quarter corner, Carter's station was 12.73 chains distant, 3.27 chains short of the record distance (Tr. 262-63, 278).

The discrepancy in the distance from the point on BLM's south line to Carter's station is attributed by Forsyth to the fact that the original surveyors "never measured the distance" (Tr. 87). Forsyth speculates that the surveyors never went to Carter's house, as indicated by the fact that a creek is incorrectly depicted on the 1881 survey plat (Govt. Exh. 2) as south of "Carters" [13] (Tr. 316). Forsyth also testified that, from the point on BLM's south

line tied to Carter's station, the station would have been visible, whereas, from the point 3 chains east of appellants' 1/4 corner on appellants' south line, the station would not have been visible (Tr. 89) The fact that the station is not visible from appellants' point is admitted by Downer and confirmed by Judge Luoma after a personal examination of the site. (Tr. II 64; Decision at 4). Forsyth testified that, at the time of the original survey, "[i]f they couldn't see something, they didn't tie it in" (Tr. 89). Thus,Forsyth explained that rather than tying the south line to Carter's station to the 1/4 corner where the station was not visible, the surveyors chose another point along the line (Tr. 280-81). Downer, on the other hand, speculated that the surveyors chose another point along appellants' south line, rather than the 1/4 corner, to tie to Carter's house in order to avoid crossing a steeper ridge (Tr. 376-77). Downer also speculated that the surveyors could instead have started at Carter's house and picked a route "where there were not too many

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13/ Downer asserted that the surveyors were likely familiar with the station because Carter had the "only facilities for several miles for food and drink" (Tr. 449).

trees" back to the section line [14] (Tr. II 118). Downer testified that, in any case, crossing the ridge would have simply involved the process of "whittling in" (Tr. II 117-18).

In his September 1985 decision, Judge Luoma ordered a resurvey on the basis of the "many deviations from the original calls and distances in BLM's resurvey," citing in particular the fact that "[a]ppellants' distance to Carter Station is closer to the record distance" (Decision at 12-13). Indeed, given BLM's south 1/4 corner, and, using the record bearing of S. 12-1/2° E., the record distance of 16 chains from a point 3 chains west of the corner considerably overshoots both the house and barn. Even using a bearing of S. 14° 18' E., which varies from the 1881 survey field notes, the distance considerably overshoots both the house and barn. [15] We, like Judge Luoma are unwilling to accept speculation that the discrepancy is due to the fact the surveyors never travelled to the station. [16] By contrast, given appellants' south 1/4 corner, using the record bearing of S. 12-1/2° E. and the record distance of 16 chains from a point 3 chains west of the corner, falls in the midst of Carter's station, just south of the barn. BLM, however, points out

that the original call was to "Carter's House," and that meeting this call results in a bearing of S. 19° E. given appellants' quarter corner.

We note that, in the 1881 survey field notes, the word "Carter's" is handwritten, while the word "House" is printed. It is possible that, in preparing the notes, the surveyors neglected to correct the printed material. However, even more persuasive that the surveyors meant to tie in the barn rather than the house is the fact that the 1881 survey plat (Govt. Exh. 2) places "Carters" north of the ravine. BLM asserts that this demonstrates the fact that the surveyors never travelled to Carter's station. Rather, we conclude that it demonstrates that the surveyors tied to the barn which was north of the ravine, rather than the house which was south of the ravine. Appellants also argue that:

> From the barn they could chain to the section line by a relatively open route where there were no large trees, and without crossing the ravine. The barn was the center of activity at this busy way station for the teamsters and stagecoach drivers during this period, which was during the Bodie mining boom.

14/ Bland testified that, if the surveyors had started at Carter's house, they would have run "due north instead of north 12-1/2 degrees west, which [they] would have nearly intersected

the quarter corners of either, * * * within 200 feet" (Tr. 317).

15/ Appellants also note that this call can be looked at in terms of how far south Carter's station is from the section line. The record distance is 1,031 feet. They calculate that Carter's station is only 800 feet south of BLM's section line, whereas, using a bearing of either S. 12-1/2° E. or S. 19° E., the station only deviates from the record distance by at most 32 feet from appellants' section line.

16/ The station provided solid and liquid refreshments and lodging at the time of the survey. One could assume they may have stopped by on one or more occasions.

(RB-A at 4). There is a great deal of speculation whether the surveyors tied in Carter's station by proceeding from the section line southeast or from the station northwest back to the line. We accept that it is possible that the surveyors started from the line, as determined by appellants, even though Carter's station was not visible using the process of "whittling in," or that they started from the station and intersected the line. Furthermore, we accept that it is possible the surveyors did not proceed due north from the station or due south from the 1/4 corner in an effort to avoid "chaining over the top of a hill through a forest of pinenut trees, and then down the other side" (RB-A at 5). However, we simply do not know what the surveyors did. The fact remains that BLM's 1/4 corner does not match the call to "Carter's House," whereas appellants' corner does, within a reasonable level of tolerance.

This also raises doubts as to the accuracy of BLM's location of the south 1/4 corner. Cf. J. M. Beard (On Rehearing), 52 L.D. 451 (1928).

Bearing of the section line between secs. 4 and 9

There is also the matter of the 5-degree deflection in the south line as a result of BLM's placement of the 1/4 corner. Neitz admitted that the deflection is about 4 degrees and 33 minutes, which would have caused the surveyors some concern (Tr. 246-47). However, no mention is made of that deflection in the 1881 survey field notes. Downer asserts n his posthearing brief at page 15 that the resulting bearing from the south 1/4 corner to the southeast corner of sec. 4 is N. 85° 45' E. See Tr. 404. BLM's dependent resurvey map (Govt. Exh. 34) gives the bearing as N. 84° 48' E. The record bearing is N. 89° 56' E. By contrast, the bearing from appellants' 1/4 corner is N. 89° 49' E. [17]

On appeal, BLM admits a 5-degree deflection in the south line but contends that the deflection can now be "reduce[d]" by declaring the southeast corner of sec. 4 lost and reestablishing the corner by double proportionate measurement. BLM quotes the following testimony of Forsyth: "We did not find a corner of [secs.] 3, 4, 9 and 10. We accepted evidence that was used by other people. We felt that that was not the corner, but we couldn't prove

it, so we accepted that" (Tr. 275). BLM asserts that the reestablished southeast corner would bear N. 86° 13' E., a distance of 39.75 chains, from the south 1/4 corner. [18] The record distance is 39.86 chains. While this would virtually eliminate the deviation from the record distance, the resulting

17/ In RB-B at page 4, appellants assert that the bearing is actually N. 89° 31' E. Downer testified that the bearing is N. 89° 33' E. (Tr. 403). Appellants' exhibit D gives the bearing as N. 89° 33' 21" E.

18/ BLM states that the corner would be moved 0.75 chains south and 2.6 chains east, us in the east 1/4 corner of sec. 9, the south 1/4 corner of sec. 4, the southeast corner of sec. 3, and the southeast corner of sec. 2. The obvious problem with this method is that it assumes the accuracy of the south 1/4 corner of sec. 4. Moreover, BLM admits that it assumes "no intervening corners could be found" to be used as control corners (Brief at 4).

bearing is still off by 3° 43', which is a significant deviation. See Gilbert & Logie Nolan, A-30905 (Aug. 8, 1968). Appellants also argue that moving the southeast corner would cause the corner to fall "completely out of agreement" with the calls at that corner (RB-B at 1; see also footnote 4). Appellants note that the accepted corner was "perfectly" in agreement with three calls to a tunnel, a gulch, and a quartz ledge (RB-A at 3). We note that the Jones survey, which was accepted by BLM as locating the

southeast corner (TR. 276), found a stone mound at this point which matched the original calls to evidence of an old tunnel and the bottom of a draw. See Govt. Exh. 16 (Sheet 3 of 9). BLM has presented no evidence supporting its contention that this corner should not be accepted. Forsyth testified only that the accepted corner did not match the original calls (Tr. 275). However, he also admitted that moving the southeast corner would mean that the tunnel described in the 1881 survey field notes would be "one chain" north of the south line of sec. 4. Id. Those notes clearly establish that the tunnel bears one chain south of the line (Govt. Exh. 3). We are unwilling to believe that the original surveyors could not distinguish north from south, however inaccurate they may have otherwise been. BLM has simply provided no justification for moving the southeast corner of sec. 4, which was accepted in the dependent resurvey "as a careful and faithful perpetuation of the position of the original corner" (Govt. Exh. 35 at 3, emphasis added). Accordingly, the 5-degree deflection remains. It is apparent that Judge Luoma, in ordering a resurvey, relied in part on this "five degree bend in BLM's south line" (Decision at 12). Indeed, it indicates that BLM's south 1/4 corner does not bear a "proper relation to

known corners" (Survey Manual at 5-9). We find th belatedly proposed solution to an obvious discrepanc in the resurvey does not solve the problem: Rather it compounds it.

Stage road to Bodie

We turn next to the calls west of the south 1 4 corner of sec. 4. The first call, located at 51.2 chains west of the southeast corner, is: "Cros Stage Road, to Bodie bears N.W. & S.E. and ascend. Appellants and BLM dispute the location of the Bodi road, which was abandoned and has been largel obliterated over the years. Bland testified tha BLM identified the location of the road first usin an 1893 reconnaissance map (Govt. Exh. 39), whic depicts a road running northwesterly from "Carters with a "definite left turn or a different angle curve in the road where the wash from the northeas comes in and crosses the road" (Tr. 310). Blan noted that this road, with its distinctive bend also appears in a 1974 orthophotograph of the are (Govt. Exh. 40) and a 1938 aerial

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19/ There was some testimony by Downer that BLM's placement o the south line of sec. 4 would also reduce the homestead originall patented to Carter in 1881, which totalled 160 acres, by 2 acres (Tr. 40, 117). In his decision at page 7, Judge Luom mentioned this problem, but did not expressly attribute an importance to it. BLM now argues that the loss in acreag cannot be calculated until sec. 9 is properly "subdivide[d], which would involve reestablishing the south and west 1/4 corners.

photograph of the area (Govt. Exh. 41) (Tr. 310-11). BLM has either placed or superimposed section lines for sec. 4 on each of the exhibits.

The lines on the 1893 reconnaissance map constitute "a very rough sketch" by Eugene Faust, a cartographer with the Geological Survey, done at the hearing (Tr. 290). Faust stated that there is "very close" agreement as to the depiction of the Bodie road between the three exhibits (Tr. 292). This agreement is purportedly illustrated in an overlay for the 1974 orthophotograph (Govt. Exh. 40A), which is a blow-up of a portion of the 1893 reconnaissance map (Govt. Exh. 39) (Tr. 289-90). The 1938 aerial photograph also has two overlays (Govt. Exhs. 41A and 41C), which depict the section lines for sec. 4, as determined by appellants and BLM (Tr. 312).

The field notes of the dependent resurvey (Govt. Exh. 35 at 6) also state that BLM found a "[b]laded road." Bland testified that the distance to BLM's placement of the Bodie road from the south 1/4 corner along BLM's south line is 11.40 chains, and the distance along appellants' south line is 8.97 chains (Tr. 312-13). The record distance is 11.36 chains (Govt. Exh. 3).

The underlying premise to BLM's location of the Bodie road is, of course, that the 1893 reconnaissance map accurately depicts that location. We note, however, that the 1881 survey plat (Govt. Exh. 2) shows no distinctive bend in the road within sec. 4. Appellants have also called into question the accuracy of the 1893 map. Downer testified that he compared the measurements between Carter's station and Sugarloaf Mountain on the 1893 map and a 1957 Mt.Siegel Quadrangle map, prepared by Geological Survey, and that there was a discrepancy of "over 800 feet" (Tr. 382). He later testified that he found "about 1000 feet * * * difference in a length of about four and a half miles" (Tr. 464). Appellants argue that: "The 1893 topographical map was sketched by govt. surveyors using plane tables and alidades set up at mountain top triangulation stations and was not intended to portray accurate locations, but was very useful in portraying the terrain and roads in a general, small scale manner" (RB-A at 5). We also note that there is a definite inaccuracy in the depiction of topographic and geographic features in the 1893 map, which is very evident when comparing the 1974 orthophotograph and its overlay, which is a blow-up of a portion of the 1893 map. See Tr. 470. The inaccuracies seriously call into question the

accuracy of the depiction of the Bodie road on the 1893 map. What was said with respect to topographical features pictured on survey plats in J. M. Beard (On Rehearing), supra at 456, applies equally herein:

> It should be remembered that the position of items of topography in the interior of sections, as shown upon the plats of the public-land surveys, have been in the past and are in surveys executed by the cadastral engineering service at the present time, almost invariably based upon estimates by the surveyor, rather then upon actual measurements thereto. It is ordinarily only the distances at which section lines intersect various items of topography that are actually measured on the ground. The platted position of topography in the interior of sections therefore depends entirely upon the individual skill and ability of the surveyor in estimating directions and distances, and at best represents only an approximation of the actual position of the topography.

Downer also argues that the 1893 map depicts an alternative route for travel to and from Bodie, i.e., a "lower route" which runs "along the creek" and would be used by "teamsters caught by nightfall before reaching Carters, or by stock drovers needing a place to regroup cattle or to spend the night off

of the main road" (Downer's Posthearing Brief at 9). He further argues that the upper, rather than the lower, route constitutes the main road:

> Bodie Rd. was a franchised toll road (Bryant Toll Rd.), and a fee was charged for each man, animal, and vehicle which passed over it. A lot of livestock were driven loose over the route.
>
> A teamster or driver proceeding from Carson Valley to Bodie with a loaded freight wagon or stagecoach, after a long climb out of the valley, arrives at a point a few hundred feet north of the present west 1/4 cor. Sec. 4. Here the road splits. If he takes the road to the left, or to the east, he will continue to climb at the same steady rate toward Carters, on the road shown on the 1881 plat and on the 1923 plans. However, if he takes the road to the right, he will drop down toward the creek bottom, and proceed along it at a much lower elevation than the upper road.
>
> When he reaches the ravine, he will climb a steep grade for about 600 ft. to regain the lost elevation and rejoin the upper road at a point south of the ravine. This steep grade is between 10 and 15 percent. There are no grades this steep on the Bodie Stage Road across the Pinenut Range, except for short dips where crossing ravines. In the winter this stretch along the creek and the long climb up crossing the ravine would be difficult during wet weather due to mud and ice. In any weather it would be very taxing to his team of

horses.

Id. Downer concludes that:

> It is inconceivable that the early day teamsters and stagecoach drivers, hauling heavy loads to the Bodie mines would have used the lower "detour" route along the creek, with its adverse grade, steep pitch and washouts. They would have certainly have taken the upper, more direct, "traveled way" route, with its steady 5% grade.

(RB-A at 5). Downer contends that the lower roue was adopted later by the State highway department as a detour road "because it stays to one side of the new highway construction" (Downer's Posthearing Brief at 9).

Appellants assert that the upper route appears as a "travelled way" depicted on the 1923 Plan and Profile of Proposed State Highway (Appellants' Exh. F (Sheets Nos. 6 and 7) and that the detour road is depicted on a 1940 Material Deposits and Detour Sketch (Appellants' Exh. G). Downer plotted the detour road in part on the 1923 plan (Tr. 458). He also located the two routes on the 1938 aerial photograph (Tr. 461-63, 468, 516). We note that the "travelled way" crosses and recrosses the proposed

route of the highway near the west line of sec. 4, where as the detour road stays to the southwest of the line of the highway. Unfortunately, the travelled way is not shown crossing the south line of sec. 4 in the 1923 plan. Indeed, it disappears from the 1923 plan just east of the west line of sec. 4 and does not reappear until south of the south line. [20] Nevertheless, the evidence is sufficient to establish that the "travelled way" was distinct from the detour road. Whether that "way" was the upper route and the detour road was the lower route, as appellants contend, is another question.

We accept that the "travelled way" depicted on the 1923 plan is the Bodie road. Downer verified that the 1923 plan depicts the Bodie road in part by the fact that the plan has the travelled way crossing within 20 feet of the record distance to the southeast corner of sec. 9 (Tr. 383-84). The way also follows generally the route depicted in the 1881 survey plat. Moreover, thee is no evidence of any other well-travelled road in that area which would have been found in 1923. Indeed, Downer testified that this road was the "only existing travelway in the area when they made the first location survey in 1917" (Tr. 459). BLM's only argument on appeal is that it is "not unusual for the location of roads to be changed in desert country" (Brief at 8). However,

BLM has not tendered any evidence to establish that, in fact, there were any such changes in the location of the Bodie road. Nonetheless, as noted supra, the road does not appear on the 1923 plan at the crucial points. We cannot tell whether the road continued to generally follow the route of the proposed highway or diverged and followed the route of the detour road or another route. The best evidence depicting the Bodie road as it crosses the south line of sec. 4 is still the 1881 survey plat. Moreover, Downer testified that he found traces of the Bodie road as it crosses the south line:

> We found huge dray horses' shoes down in there. * * * Huge horseshoes from work horses. And it was very obvious, the opening through the trees, although it had been many, many years. There was still an opening through there and to go the other route, there would have [been] trees. They would have had to dodge around trees. So that was the obvious road.

[(Tr. 372). Downer stated that this road crossed appellants' south line at "very close to proper distance on the call." Id. In Downer's posthearing brief at page 23, the distance given from appellants' south 1/4 corner is

20/ Downer testified that the travelled way was only depicted on the 1923 plan where the proposed highway "crossed" that route (Tr. 383; see Tr. 373, 457-58).

11.36 chains, exactly matching the record call. By contrast, appellants point out that the distance along BLM's south line from the south 1/4 corner to the crossing of appellants' placement at the Bodie road is 8.56 chains, 2.8 chains off the record distance (RB-B at 2).

Thus, whether appellants' or BLM's south line of sec. 4 matches the call to the Bodie road depends on whether we accept appellants' or BLM's location of the Bodie road. The best available evidence, namely the 1881 survey plat and Downer's testimony of what he discovered on the ground where the road depicted on that plat crosses the south line of sec. 4, supports appellants' location of the Bodie road. [21] See Appellants' Exh. P. BLM never contradicted Downer's on the ground identification; rather, Bland merely testified that appellants' crossing of the section line could not be verified on the 1938 aerial photograph (Tr. 313-14). Thus, accepting appellants' location of the Bodie road, appellants' south line matches the call from the south 1/4 corner and BLM's line does not. We note that Judge Luoma was likewise persuaded. See Decision at 13. As previously noted,

this also raises doubts as to the accuracy of BLM's location of the south 1/4 corner.

Bodie telegraph line

The next call is to the "Bodie telegraph line," which crosses the south line of sec. 4, bearing northwest and southeast, at a distance of 12.36 chains from the south 1/4 corner. Forsyth testified that BLM did not find evidence of the telegraph line (Tr. 261). Likewise, Neitz did not discover any evidence of the line (Tr. 245). However, Downer testified that they found "high up in the pine nut trees, old brackets for the old telegraph line" (Tr. 371). Robert G.Downer, Downer's son and a registered land surveyor and civil engineer, testified that they found one insulator about 40 feet north of the section line and another further north of that line [22] (Tr. 133-35). Downer testified that, although the telegraph line was a "zig-zag line," it would have crossed appellants' section line

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21/ The road in the 1893 map is plainly not the Bodie road depicted in the 1881 plat. Aside from the obvious inaccuracies in the 1893 map, appellants have offered a very plausible explanation for this discrepancy, i.e., the 1893 map depicts another route which was an alternative to the main road. This alternative route was picked up in the 1893 map and then, after it was converted to a detour road, appeared in the 1938 aerial photograph and the 1974 orthophotograph and was discovered by BLM during the dependent resurvey as a "bladed road." We note that there is a distinct similarity in configuration between

the road in the 1893 map and the road which appears in the 193 aerial photograph and the 1974 orthophotograph, as well as th 1940 detour sketch. In particular, there is in all cases th distinctive east-west bend in the road at approximately th same point. This strongly suggests that the road in the 189 map is now the detour road.

22/ In RB-B at page 4, appellants state that the two insulator were "north of the section line distant about 100 [feet] and 30 feet."

"fairly close to 27-1/2 chains," almost exactl matching the record call (Tr. 371-72). BLM does no dispute this. There is no evidence of where thi telegraph line would have crossed BLM's south line

Gulch crossing

The next call is "Cross Gulch, 20 lks. wide, Cours N.W.," 55.72 chains from the southeast corner o sec. 4 or 15.86 chains from the south 1/4 corner Bland testified that the distance from BLM's sout 1/4 corner to the gulch is 16.20 chains, whereas th distance from appellants' corner is 15.95 chain (Tr. 314). Downer testified that appellants' sout line met the record call "within five feet of recor distance" to the southeast corner (Tr. 371). In hi September 1985 decision at page 6, Judge Luom concluded that "[b]oth parties' measurements ar close to the record because the creek makes a southeas bend from Downer's south line of Section 4 to BLM' south line of Section 4." The evidence regardin

this call is inconclusive.

Additional blazes

Appellants also point out that their south section line west of the south 1/4 corner follows the route of a double-blazed tree and several old directional line cuts. Downer testified that the double-blazing which appears on the tree at breast height, on either side along the section line, was a "standard [surveying] practice" and that the blaze on the tree was age-dated to 1881 [23] (Tr. 370; see Govt. Exh. 31). Downer also regarded these trees as "blaze trees on line" (Tr. II 44). Again, the evidence of a double=blazed tree (located on appellants' exhibit D) supports appellants' location of the south line between the south 1/4 and southwest corners of sec. 4.

After reviewing all of the evidence regarding the location of the south 1/4 corner of sec. 4, we conclude that the corner is lost. Neither appellants nor BLM have established beyond a reasonable doubt that they have recovered the original monuments or accessories, the corner has been perpetuated, or collateral evidence locates the original position of the corner. However, the evidence regarding the record calls to the southeast corner of sec. 4, Carter's house, the Bodie road, the Bodie telegraph

line, the gulch, and the two blazed trees (east and west of the 1/4 corner), as well as the bearing of the south line of sec. 4, all support to appellants' location of the boundary between sec. 4 and 9, rather than BLM's.

23/ Downer also testified to finding another double-blazed tree, of which he was a "little doubtful" (Tr. 369). The blaze on this tree was age-dated "a little too early." Id. Government exhibit 30 indicates that the blaze was apparently made "after the growing season of 1877 and before the growing season of 1878."

Quarter Corner Common to Secs. 4 and 5

T. 11 N., R. 21 E., MDM

The monument at the west 1/4 corner is described in the 1881 survey field notes as follows: "Set Trachyte Stone 42x22x20, in Stone mound, 4 [feet] in diameter at base, by 2 [feet] in height" (Govt. Exh. 3). Both appellants and BLM contend that they have found the corner monument.

BLM's monument

The field notes of BLM's dependent resurvey state that BLM found a "granite stone, 14x6x4 [inches], firmly set in a mound of stone, plainly [marked] 1/4 on the [West] fact" (Govt. Exh. 35 at 8). This stone was accepted by the Jones survey (Tr. 238).

Forsyth estimated that the stone weighs 35 pounds, which could be moved around (Tr. 94; see Tr. II 88-89). He regarded the 1/4 marked on the stone as "very old markings" (Tr. II 110). This was disputed by Downer and Robert E. Jones, appellants' consulting geologist who believed the markings to be recent (Tr. 174; Tr. II 135-36). Bland also testified that:

> To my knowledge, there is no way to define how long a stone has been marked. I have seen marks that I thought were fresh and I looked at literally thousands of corners on the ground and what may look like a fresh mark, in turn, has to be the original survey. There is no way to define whether a rock has been marked 40 years, 60 years or 100 years.

(Tr. 329).

BLM's stone was examined by Jones, who testified that the stone was a fine-grained, siliceous volcanic rock or trapstone, which is distinguished from a trachyte stone by being a finer grained, intrusive as opposed to extrusive and more siliceous (Tr. 172-73). He stated that "[s]omeone might confuse it with trachyte" (Tr. 174). However, he also stated, when asked whether a surveyor before 1910 would know the difference between a trachyte stone and a trapstone, that, from his experience with cadastral survey,s the early surveyors were "very good on

their rock identification" (Tr. 192; see Tr. 197-99). We, of course, do not know the extent of the training of the original surveyors in the identification of rocks. Nevertheless, the accuracy of their identification can be determined by comparing the descriptions in their field notes with the descriptions of those found stone corner monuments recognized by all parties as being the original. Jones generally attested to the accuracy of the early surveyors. In addition, the 1881 survey field notes indicate that Stewart and Conkling refer to five different types of stone, viz., trachyte, granite, trapstone, quartz, and porphyry. See Govt. Exh. 3. This suggests a familiarity with the distinctions. [24] The evidence regarding the age of the

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24/ However, Government exhibit 50, which compares monuments left by Stewart and Conkling in an 1881 survey of T. 13 N., R. 21 E., MDM, Nevada, and those found during a 1973 BLM dependent resurvey, indicates that in six instances BLM found a granite stone where a trachyte stone had been described in the 1881 survey field notes. The stone sizes were fairly closely matched, however.

25/ Both Forsyth and Bland testified that the minimum size for the 1881 survey was 1,000 cubic inches (Tr. 270; Tr. II 89; see Survey Manual at 4-8). The 1881 Instructions at page 32 state that corner stones must not be "less than 504 cubic inches." In any case, the stone described at the west 1/4 corner of sec. 4 in the 1881 survey field notes was 18,480 cubic inches. In Frank Lujan, supra at 189, we found a "fairly significant disparity" between the size of the record stone (16x14x12 inches) and the size of the found stone (12x6x4 inches), but regarded this disparity as only raising "doubts." In so holding, we relied on testimony that the early surveyors often misdescribed stones in order to meet the minimum size.

26/ In his posthearing brief at page 6, Downer stated that the surface dimensions of the stone are 42x24x22 inches.

BLM's stone is inconclusive at best. However, most disturbing is the discrepancy in size between BLM's stone and the stone described in the 1881 survey field notes. Judge Luoma concluded that "it seems unlikely the field notes are describing a six-inch high stone" (Decision at 9). We and note that, in this respect, the BLM stone is "widely different from the record" [25] (Survey Manual at 5-7).

Appellants' monument

Appellants also found what they believe to be the corner monument, which is described as a trachyte stone embedded in the ground measuring 42x22x20 inches on the surface with a 1/4 chiseled on the west face [26] (Appellants' Exh. D; Tr. 391-92). Appellants did not find a mound of stones, which did not surprise Downer given the possibility of cloudbursts sending water through that drainage area (Tr. 487-88). Downer testified that the stone was a "vulnerable rock" susceptible to weathering, which made identification of the 1/4 mark difficult (Tr. 481-82). Nevertheless,

Jones testified that the stone had a 1/4 chiseled on it:

> When I examined the rock, thee was a fracture on the rock that had obvious chisel marks along it. There was a small marking on the upper side of the groove, which was approximately two inches long, a quarter of an inch deep, a half-inch wide. It had lichens in it.
>
> Below the slash and to the right was a -- the rock had been defaced but there was an obvious -- there is an obvious impression of a 4 on it.

(Tr. 170; see Tr. 177, 185). Appellants' witness Jones estimated the markings on appellants' stone to be at least 100 years old (Tr. 171). In Government exhibit 26, Francis Dickinson, a former Forest Service employee acting as a consultant to appellants, reported that he found the original monument with

"1/4 chiseled into the westerly face." Jones also estimated the weight of the stone to be 1,000 pounds (Tr. 183). Forsyth described the stone as 48x42x35 inches, weighing about 1,300 pounds [27] (Tr. 149). Appellants also offered the testimony of Dave Duryee, manager of a local masonry supply business,

who stated that 1/4 had been chiseled on the face of appellants' stone (Tr. 206-07). When asked how evident the mark was on the stone, Duryee testified: "You have to look for it. There is ind of a natural cleavage line that goes from the bottom of the rock up or whatever and then there is a 1, a very definite 1, as far as I am concerned, above that and below that, the 4 is there and it is rather vague but it is there" (Tr. 213).

Forsyth, however, testified that appellants' stone had no 1/4 marked on it and, indeed, "no evidence of chisel marks" (Tr. 284; see Tr. II 108). Forsyth also stated that the early surveyors never marked a stone in numbers "a foot high and six to seven inches wide" [28] (Tr. 150). Bland also could not find any "original chiseling marks" on the stone (Tr. 328-29; see Tr. II 90-=92). Faust testified that the stone was "not a marked quarter corner" (Tr. 294; see Govt. Exh. 28 at 1).

BLM has also questioned appellants' stone because the 1881 survey field notes refer to the fact that the surveyors "set" the stone, rather than that it was an in place stone. BLM suggests that the stone must have been smaller. Forsyth testified that setting a stone would involve moving a stone into position rather than using an inplace stone,

and that in any case the surveyor would have indicated what he did in his notes (Tr. II 112-14). BLM introduced a copy of the field notes of a 1900 subdivisional survey of T. 22 N., R. 18 E., MDM, Nevada, by Stewart (Govt. Exh. 75), which contains a number of references to rocks inplace as corner monuments and, in one case (page 36), the word "set" is crossed out when referring to a rock inplace. [29] See Govt. Exh. 76; Tr. II 76. The 1900 field notes also refer to setting stones. Thus, it appears that setting a stone is distinguished from using a rock inplace as a corner monument. BLM's witnesses concluded that the original surveyors regarded setting a stone as moving a stone into position.

27/ Appellants attribute the fact that BLM's dimensions for the stone are larger than appellants' to the fact that BLM excavated around the stone before taking a measurement. Indeed, Forsyth testified that Government exhibit 68 was a photograph of him "standing with my hand on the boulder after we dug around the base to see how big the boulder was, to see what the size was" (Tr. 150-51). The 1881 survey instructions require that "dimensions above ground must be given "(Downer's Posthearing Brief at 6; see 1881 Instructions at 32).

28/ In his posthearing brief at 20, Downer stated that "[a]ctually the '1' is about 4" high, and the '4' is about 4" high by 4" wide."

29/ Downer read page 36 as "[s]et a rock inplace" (Tr. 489; see Tr. 491). Government exhibit 76 is a blow-up of that page, which indicates that the word "set" is crossed out.

Downer, on the other hand, testified that setting a stone in the 1881 survey field notes could mean either moving a stone into position or marking a stone (Tr. 472-73). [30] In any case, regardless of how the original surveyors defined setting a stone, we must conclude that the reference in the 1881 survey field notes to setting a stone, weighing over 1,000 pounds, by moving it into position is, in the words of Judge Luoma, "not a reasonable proposition" (Decision at 8). We, therefore, conclude that this was an inplace stone.

The word "set" in the 1881 survey field notes is also printed and the surveyors may simply have failed to correct the error or felt an obligation to strictly conform the notes to the format set forth in the instructions. See Tr. II 34. We find this more plausible than that the surveyors actually meant a smaller stone, as suggested by BLM. However, we cannot find beyond a reasonable doubt that appellants' stone is the stone described in the 1881 survey field notes.

Judge Luoma personally inspected appellants' stone and reports in his September 1985 decision at page 8: "My untrained eyes failed to detect what I could consider to be man-made markings on the Downer

stone." We also have studied the photographs of the stone introduced at the hearing, particularly Government exhibits 64 and 67, and, while we admit that a photograph is not as food as seeing the evidence first hand, we are unable to discern man-made marking on the stone with sufficient certainty to conclude Judge Luoma had erred. We note that Jones had the same difficulty in identifying a 1/4 in the photographs. See Tr. 175-79.

As pointed out by Judge Luoma, there is the "small" probability that the stone fell "directly on line" (Decision at 9). However, that probability exists. Both Downer and Forsyth testified that an inplace stone would have to be extremely close to the line in order to be used as a corner monument (Tr. II 57-79, 112-14). In a limited survey of the area surrounding appellants' stone, however, Downer stated that they did not find another "big embedded stone of that nature" (Tr. II 56-57). Forsyth testified that there were similar embedded stones northwest of appellants' stone, but from 50 to 80 feet away (Tr. II 111-12).

Calls from corners

Appellants argue that their stone is "on line." Appellants note that their 1/4 corner is, respectively, 142 feet long from the record distance

two undisputed corners (Downer's Posthearing Brief at 14). By contrast, BLM's 1/4 corner is, respectively, 173 feet long and 343 feet short of the record distance from these corners. Id. at 13. The bearing on appellants' west line between the southwest and west 1/4 corners is N. 0° 34' 22" W., close to the record bearing of N. 0° 14 E. See Appellants' Exh. 3. The bearing of BLM's west line is N. 0° 39' W. See Govt. Exh. 34.

Proceeding north from the southwest corner of sec. 4, the first call is to a gulch at 38 chains, or 2.35 chains south from the west 1/4 corner. Downer testified that appellants' west 1/4 corner was "up to a half a chain off" the record call, but that the creek "has two beds there" (Tr. 381). According to Downer, "it depends on which one you want to take and which way the cloudbursts scoured it in the last hundred years" (Tr. 381). The field notes of BLM's dependent resurvey indicate that a wash crosses BLM's west line at 38.20 chains. However, the wash

30/ The 1881 Instruction set forth the form of survey notes beginning at page 22 and stated "their work in the field must strictly comply with the same." All notes speak of a stone being "set." The instruction further provided at page 32: "When a rock in place is established for a Corner, its dimensions above ground must be given, and a cross (X) marked at exact Corner point. In other respects form for stone corners will be used."

is described as 20 links wide, draining NNW, as opposed to the 25-link wide gulch, draining NW, described in the 1881 survey field notes. We find the evidence regarding the gulch inconclusive. Downer found "no vestige" of the Bodie telegraph line, i.e., the next call. Id.

The next call beyond the telegraph line is the Bodie road at 43.50 chains, or 3.15 chains north from the west 1/4 corner. As has already been discussed, there is a clear dispute between BLM and appellants on the location of the Bodie road. However, as noted supra, we accept that the travelled way depicted in the 1923 plan (Appellants' Exh. F) is the Bodie road. Sheet No. 7 of the 1923 plan shows the travelled way crossing the west line of traces of the road on the ground "[a]ll through that stretch" (Tr. 468; see Appellants' Exh. T). Downer further testified that the distance from where the road crosses the section line to appellants' 1/4 corner is 3.3 chains (Tr. 387). By contrast, the distance to BLM's 1/4 corner is 6.5 chains[31] (Tr. 387-88). We cannot say that appellants' 1/4 corner is precisely "on line." However, we conclude their the corner is "on line" within an acceptable level of tolerance.[32] By contrast, BLM's quarter corner is definitely not on line.

31/ Page 9 of the field notes of BLM's dependent resurvey (Govt. Exh. 35) states that the distance between BLM's west 1/4 corner and an "[o]ld bladed road" is 3.20 chains. However, we do not accept this road as the Bodie road described in the 1881 survey field notes. In his posthearing brief at page 8, Downer also stated that, near the 1/4 corner, BLM's purported Bodie road has an "adverse grade," whereas the actual Bodie road "maintains a long steady grade along this stretch." The distance from appellants' west 1/4 corner is 2.11 chains (Tr. 326-27).

32/ Appellants also pointed to a series of "line cuts" extending north and south from their southwest corner. See Tr. 379-80; Appellants' Exh. D. However, there is no evidence that these trees were either line trees or blazed trees on or near the line established in the manner prescribed in the 1881 Instructions at page 12.

With respect to appellants' corner monument, Judge Luoma concluded: "If the rock is indeed of the dimensions given in the field notes, and there are no other rocks of its kind in the area, Downer's rock has to be the true monument" (Decision at 9). We agree, with the caveat that there must be more conclusive proof that there is a 1/4 marked on the stone. The record is conclusive proof that there is a 1/4 marked on the stone. The record is simply inconclusive on this latter point. [33] BLM's examination of the stone to date has been merely a visual inspection by cadastral surveyors, with no particular demonstrated expertise in geology or even archaeology. Appellants' stone would need to be subjected to

independent scientific analysis in order to determine whether a 1/4 is chiseled into the face of the stone, or indeed whether the stone bears any man-made markings.

In any case, the location of the west 1/4 corner of sec. 4 has not been determined such that the accuracy of BLM's location of the southwest corner can be verified. To the extent that the evidence supports appellants' west 1/4 corner, the accuracy of BLM's location of the southwest corner is thrown into doubt. The record does not indicate precisely how the west line of sec. 4 between these two corners would differ from the 1881 survey record, if appellants' west 1/4 corner and BLM's southwest corner were accepted. However, a significant deviation would clearly result. See Appellants' Exh. D. Speculation as to this deviation would be premature until BLM has fully investigated appellants' west 1/4 corner in the course of another dependent resurvey. It may be that on reexamination BLM may discover this to be the true original corner monument. At this point, it is sufficient to say that we agree with Judge Luoma that the evidence regarding the west 1/4 corner casts doubt on the accuracy of BLM's location of the southwest corner.

Corner Common to Secs. 4 and 5, T. 11 N., R. 21 E.

Secs. 32 and 33, T. 12 N., R. 21 E.

The southwest corner of sec. 4 is also tied to the northwest corner of that section, with a record distance of 80.35 chains on a bearing of S 0° 14' W. The location of the northwest corner is also disputed by appellants. The monument at this corner is described in the 1881 survey field notes, prepared by Conkling, as a 20x10x8-inch trachyte stone set in a stone mound, 4-1/2 feet in diameter at base and 2 feet high, with two

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33/ BLM also challenged appellants' west 1/4 corner on the basis that no cross (X) was "cut at the exact cornerpoint on the rock" (Brief at 10). BLM cites page 107 of the Survey Manual. That manual provision provides for making a cross (X) "at the exact corner point" in cases "[w]here the corner point falls upon surface rock, preventing excavation" necessary for placement of a stone monument in the ground. Id. The 1881 Instructions at page 32 also require that a cross (X) be marked "at exact Corner point" in cases where "a rock in place is established for a Corner." Appellants' witness testified that they believed there to be a cross (X) marked on top of the rock, but this evidence was also inconclusive.

bearing trees, a 12-inch-diameter pipe 25 links distant on a course of S. 28° W., and a 6-inch-diameter pine 20 links distant on a course of S. 57-3/4° E. (Govt. Exh. 44). This corner was dependently resurveyed by BLM in 1973 (Group No. 496), which located two bearing trees with blazes age dated to 1881 (Tr. 328; Govt. Exh. 35 at 10). The bearing trees are described as a 12-inch-diameter pine 45

links distant on a course of S. 74-1/4° E. and a 12-inch-diameter pine 30 links distant on a course of S. 26-1/2° W. See Govt. Exh. 35 at 10. Judge Luoma noted that the 12-inch-diameter pine in the southeast quadrant is "particularly off" (Decision at 9; see Appellants' Exh. J). [34]

There is no indication whatsoever in the field notes of BLM's dependent resurvey that BLM had found the original stone corner monument. See Govt. Exh. 35 at 10; Govt. Exh. 16 (Sheet 2 of 9). However, at the hearing Bland testified that BLM as a "marked rock" (Tr. 344). In Government exhibit 28 at page 1, Faust reported that BLM's corner consists of a "notched rock (4 notches on one side and 2 notches on the opposite side) in a rock mound." No dimensions for the stone are given. In Government exhibit 26 at page 3, Dickinson stated that BLM's corner was "unsupported by a proper record stone."

Appellants also state that BLM's northwest corner of sec. 4 is 230 feet short of the record distance to the northeast corner of sec. 4, 342 feet short of the distance to the southwest corner of sec. 9 and 182 feet long from the distance to the northwest corner of sec. 33, T. 12 N., R. 21 E., MDM, Nevada, which corners are undisputed (RB-A at 1).

Appellants used the method of single

proportionate measurement to establish the northwest corner of sec. 4, using the north 1/4 corner of sec. 4 and the northwest corner of sec. 5 (Tr. 416-17). These control corners are not the corners accepted by BLM in the 1973 dependent resurvey. See Appellants' Exh. D. The record is not fully adequate to assess the accuracy of appellants' control corners and, thus, is inadequate to assess appellants' placement of the northwest corner of sec. 4. Appellants assert that these control corners match various calls and, in particular, create north lines for secs. 4 and 5 which closely match the various calls and bearings. See Tr. 398-400, 420-25; Tr. II 121-26; Appellants' Exh. KK). BLM disputes appellants' assertion. See Tr. II 81-82.

Nevertheless, as discussed infra, we cannot say in view of the scribed stone and the blazed bearing trees that the northwest corner of sec. 4 is lost, such that resort must be had to the method of proportionate measurement to locate the corner. Rather, we conclude that the corner has

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14/ We also note that the Jones survey described in is corner record (Govt. Exh. 16 (Sheet 2 of 9)) finding three bearing trees, a 4-inch-diameter pine 30-feet distant bearing N. 58° E., a 5-inch-diameter pine 15-feet distant bearing S. 72° E. and a 10-inch-diameter pine 66 feet distant bearing N. 60° W. No explanation is given in the record for the discrepancy between what BLM and the Jones survey found at this section corner.

been found, hand, in his 1913 survey, Reppert reported finding at the corner of secs. 11, 12, 13, and 14 a "quartzite stone 10x10x20 [inches] firmly set in a mound of stone * * * [with] four deep grooves chiseled on the south face and one groove on the East face," as well as a 14-inch-diameter pine bearing tree located 47 links distant on a bearing of N. 70° 32' E. (Appellants' Exh. B at 8). The record stone is described as a quartz stone 16x10x10 inches set in a stone mound. See Govt.Exh. 3. Reppert accepted the stone monument as the original corner (Appellants' exh. B at 13-14). We, likewise, find no "material disagreement" as a result of the way this monument was marked (Survey Manual at 5-7). This evidence indicates that Stewart and Conkling marked their stone monuments with grooves as well as notches. We, therefore, cannot presume that Stewart and Conkling, in setting the southwest corner of sec. 4, complied with the requirement to notch stone monuments used to identify corners common to four sections. We, therefore, attribute no importance to the fact that BLM's stone is not properly notched. [37]

Bearing Trees

The four bearing trees found in the field clearly do not conform to the record. The substance of this

finding can best be illustrated by restating the reference to the bearing trees in the 1881 notes (Govt. Exh. 3) and the resurvey notes (Govt. Exh. 35). The stewart and Conkling survey notes state:

> from which bears, a Pine 12 [inches in diameter] N. 80° W. 19 [links distant], Pine 16 [inches diameter] S. 79° W. 23 [links distant], Pine 10 [inches diameter] S. 54° E. 31 [links distant, and] Pine 8 [inches diameter] S. 62° E. 28 [links distant].

(Govt. Exh. 3). On the other hand, the notes of the 1982 resurvey contain the following statement regarding bearing trees;

> from which the original bearing trees

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fn. 36 (continued)
See Govt. Exh. 49 at 7; Govt. Exh. 50 at 4. This suggests that the stone monuments found by the 1973 dependent resurveys may not have been the original monuments.

37/ We also note that, in is dependent resurvey, BLM found a rebar, 1-inch in diameter, with a cap on top marked "T 11 N R 21 E 4 5 8 9 RLS 3740 1981," next to the stone identified by BLM as the corner monument (Govt. Exh. 35 at 7). This stone had been placed by the Jones survey in 1981. See Govt. Exhs. 15, 16. However, the corner record for this corner prepared in connection with the Jones survey (Govt. Exh. 16 (Sheet 3 of 9)) states that the Jones survey found a "18x14x7 stone, 5 notches on south, 4 notches on east * * * in stone mound." This suggests that BLM's 22x17x9 stone was placed at that site sometime between the time of the Jones survey and the BLM dependent resurvey in 1982, and is either not the original stone or that it was moved to that location. It also calls into question the accuracy of the Jones survey.

> A stump hole, bears N. 18-1/2° E., 23 lks. dist., with an uprooted pinon lying alongside, 6 ins. diam., mkd. BT on open blaze. (Record: S. 62 ° E., 28 lks. dist.)
>
> A stump hole, bears S. 43-3/4° E., 18 lks. dist., with an uprooted pinon lying alongside, 12 ins. diam., mkd. BT on open blaze. (Record: S. 54° E., 31 lks. dist.)--
>
> A stump hole, bears S. 56-3/4° W., 22 lks. dist., with an uprooted pinon lying alongside, 8 ins. diam., mkd. BT on open blaze. (Record: S. 79° W., 23 lks. dist.)
>
> A stump hole, bears N. 50-1/2° W., 14 lks. dist., with an uprooted pinon lying alongside, 8 ins. diam., mkd. BT on open blaze. (Record: N. 80° W., 19 lks. dist.)--

(Govt. Exh. 35, at 7). As stated by Judge Luoma: "Worth noting, however, is the fact that all the trees are considerably (up to 50%) smaller in diameter than the trees in the 1881 field notes. They also do not match the field notes in distance, and are particularly off from the field notes in angles" (Decision at 6). BLM attempts to generally explain the fact that its bearings and distances do not match the original record by the fact that the early

surveyors made their notes based on the recollections of the "cornerman," and the fact that the 1881 surveys covered 700 miles in 2-1/2 months. [38] See Tr. 158-59; Tr. II 119.

We note that the 1881 Instructions at page 44 provide that these notes "must always be written down on the spot, leaving nothing to be supplied by memory." We must presume that Stewart and Conkling complied with this procedure. This is not to suggest that inaccuracies did not occur in the 1881 survey field notes in describing bearings and distances. See Tr. 240-1; Alfred Steinhauer, 1 IBLA 167, 172-73 (1970). The diameters of bearing trees may also have been misdescribed in original surveys. Elmer A. Swan, 77 IBLA 99, 101 (1983). In Stoddad Jacobsen, supra at 340, we described the discrepancies with respect to the southwest corner of sec. 4 as "considerable." We now conclude, in accordance with the Survey Manual at 5-7, that the nature of the accessories is "greatly at variance with the record." In particular, BLM places a bearing tree in the northeast

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38/ The 1881 survey field notes (Govt. Exh. 3) indicate that the surveyors covered 8 section lines, including the south and west lines of sec. 4, as well as set the south and west 1/4 and southwest corners of sec. 4 on Aug. 25, 1881. This suggests a certain amount of haste. There is no evidence as to how the original field notes were taken.

quadrant, where the 1881 survey field notes clearly do not call for a bearing tree in that quadrant. See Appellants' Exh. K. However, the evidence also establishes that the trees were blazed as bearing trees and that two of the blazes were made in 1881. The evidence indicates that one of the tree died in 1927. Forsyth testified that "one part of the stump or root system [of the southwest tree] was still stuck in the ground" (Tr. II 106). Appellants argue that either the bearing trees were moved to the area of BLM's southwest corner, or the trees were blazed on site, in an effort to create a fraudulent corner.

Appellants have also placed BLM's southwest corner in relation to other corners, vis., the southeast corner of sec. 4, the southwest corner of sec. 9, the south quarter corner of sec. 5, and the northwest corner of sec. 33, T. 12 N., R. 21 E., MDM, Nevada. The record distances to these other corners are, respectively, 79.72, 80, 39.9 and 160.35 chains, whereas the distances from BLM's southwest corner of sec. 4 are, respectively, 76.92, 74.9, 43.75 and 162.85 chains (RB-A at 2; RB-B at 2). Appellants conclude that the southwest corner of sec. 4 is "on average 207 ft. east and 274 feet. south of its recorded position. * * * The diagonal distance moved

is southeast 343 ft." (RB-A at 2). Judge Luoma particularly found "most disturbing" the fact that BLM's resurvey was in "complete nonconformity to the record calls" (Decision at 12).

Appellants' placement of the corner

Appellants determined the southwest corner of sec. 4 to be lost because the corner monument discovered by BLM did not match the bearing trees or the various calls found in the 1881 survey notes and reestablished the corner by the method of double proportionate measurement. See Tr. 361-63; Tr. II 53-55. The control corners used by appellants were the south 1/4 corner of sec. 4, the south 1/4 corner of sec. 5, the southwest corner of sec. 9, and the west 1/4 corner of sec. 4. See Tr. 365-66. The northern and eastern control corners were originally the southeast corner of sec. 4 and the northwest corner of sec. 33, T. 12 N., R. 21 E., MDM, Nevada. Id. Appellants state that the distance between the southeast and southwest corners of sec. 4 along their section line is about 80.04 chains, whereas the record distance is 79.72 chains (RB-B at 4). We also note that the bearing between the south 1/4 and southwest corners of sec.4 on appellants' exhibit D is S. 88° 56' 43" W., which also almost matches.

Downer tendered additional evidence regarding the course of the line between secs. 4 and 9 and

between 8 and 17. Certain of this evidence is worthy of note, as its existence is not refuted by BLM. Downer found a series of line blazes between sec. 4 and 9 which were age-dated as having been made in 1881 (Tr. 369-70). Downer claimed that these "line cuts" could be followed for "hundreds of feet" (Tr. 511). BLM discounted these blazes because "there is no such description of any line trees in Exhibit 3, which is the 1881 field notes." Line trees were to be noted in the field notes. However, a line tree was described in the 1855 Instructions as follows:

> 6. All lines on which are to be established the legal corner boundaries are to be marked after this method, viz: Those trees which may intercept our line must have two chaps or notches cut on each side of them without any other marks whatever. These are called "sight trees," "line trees," or "station trees." [Emphasis in original.]

Id. at 4. This section further states:

> A sufficient number of other trees standing nearest to your line, on either side of it, are to be blazed on two sides diagonally, or quartering towards the line, in order to render the line conspicuous, and readily to be traced, the blazes to be opposite each other,

> coinciding in direction with the line where the trees stand very near it, and to approach nearer each other the further the line passes from the blazed trees. Due care must ever be taken to have the lines so well marked as to be readily followed. [Emphasis in original.]

Id. As can be seen, the surveyor was required to blaze trees on each side of the line, but was not required to note the blazes unless the tree fell on line.

Downer also submitted evidence that, with the placement of the corner as proposed by BLM, a number of ties to natural monuments are consistently off by approximately three chains (Posthearing Brief at 15).

After weighing all of the evidence presented by BLM in support of the location of the corner common to secs. 4, 5, 8, and 9, T. 11 N., R. 21 E., MDM, Nevada, including the evidence as to the location of the boundary between secs. 4 and 9, we find the evidence that the monument identified by BLM as the monument for that corner does not establish beyond a reasonable doubt that the monument represents the position of the corner set in the 1881 survey. Having this doubt, we cannot hold this corner to be a "found" corner. While the character and dimensions of the monument are sufficiently close to the stone described in the 1881 field notes, the stone is

small enough to have been moved. None of the bearing trees found by BLM agree with the BLM notes in bering, distance from the corner, or size. The location of the corner and calls on the line from the corner to the SE corner of sec. 9 have wide discrepancies, and there is overwhelming evidence of the existence of multiple monuments in the general area.

We also cannot find the BLM corner to be "obliterated" as the corner is not supported by its relationship to known corners, the field notes, or indisputable collateral evidence.

In his September 1985 decision, Judge Luoma did not accept appellants' "double corners" theory. Appellants' argument in favor of double corners is premised first on the fact that they have discovered double sets of corners along the north township line, particularly at the northwest and north 1/4 corners of sec. 4 and the northwest corner of sec. 5. See Tr. 397-400, 418, 420-22; Tr. II 128-29; Appellants' Exh. D. However, there

appears to be no uniform displacement of these corners which would suggest that the entire north township line was shifted in order to achieve closure at the northwest township corner. See Appellants' Exh. D.

In addition, appellants have not fully authenticated any of the monuments accepted by them at these corners as the original monuments. [39] Indeed, appellants have abandoned the monument at the northwest corner of sec. 4 in favor of a corner determined by the method of single proportionate measurement. See Appellants' Exh. D; RB-A at 8.

In this respect, appellants' evidence is based on the existence of multiple monuments (an undisputed fact) and the fact that appellants' north township line purportedly "better" meets the calls in the 1881 survey field notes (RB-B at 3). This evidence is not sufficiently developed to reach any conclusion. See Appellants' Exh. L at 608. Appellants next rely on the fact that nine corners in secs. 4 and 5 accepted by BLM all fail to match record calls to certain undisputed corners in the same direction by "about 300 [feet]" (RB-A at 9). In his posthearing brief at page 13, Downer stated that the "average difference [was] 241 feet." In fact, the difference ranges between 165 and 361 feet. Id. Again, we cannot say that there has been a uniform shift in all of these various corners in order to achieve closure at the northwest township corner. However, it remains possible that such an attempt was made.

Summary of findings and resulting effect on resurvey

One of BLM's primary objections to Judge Luoma's decision was that Judge Luoma failed to give sufficient guidance on how to conduct another resurvey. We recognize and understand the basis for its objection even though it has no bearing on the accuracy of Judge Luoma's findings. However, we also understand Judge Luoma's reluctance to tell BLM how to do its job. In an attempt to avoid both traps, we will summarize the findings in a manner intended to give guidance to BLM for the conduct of the contemplated resurvey. In doing so we will again retrace the 1982 resurvey route.

The resurvey commenced at the monument determined to be the original monument common to secs. 9, 10, 15 and 16, T. 11 N., R 21 E., MDM, Nevada. The placement of this monument was accepted by all parties and there is no evidence to refute the placement of this corner. The placement of this corner is deemed acceptable.

The survey proceeded in a northerly direction and the 1/4 corner common to secs. 9 and 10 was remonumented, based on evidence found in the field. We also deem this corner placement to be acceptable.

The corner common to secs. 3, 4, 9, and 10 was remonumented based upon evidence that a monument found was a "careful and faithful perpetuation of the original corner"(Govt.Exh.35 at 3). No evidence

was tendered by either

39/ The same test would apply to any corner appellant claims to have been "found." A reasonable doubt remains as to these corners, as well.

appellants or BLM to refute this finding and we conclude the determination to be correct. The placement of this corner was made in the orderly course of the resurvey. To now say that this corner should be moved to straighten the dogleg in BLM's placement of the boundary between sections 4 and 9 without any consideration of the physical evidence, including but not limited to calls to natural and man-made monuments, violates the stated purpose of a resurvey. See, Survey Manual at 6-4. Judge Luoma reconstructive surgery necessary. On appeal, counsel for BLM has proposed a band-aid.

Finding no evidence of the location of the monument for the 1/4 corner common to secs. 3 and 4, the corner was established at a proportionate distance from the NE corner, sec. 4 and the SE corner, sec. 4. The placement of this corner was not disputed and no evidence has been proposed to lead us to conclude that this 1/4 corner was not properly set.

The resurvey then continued on a westerly course from the corner common to secs. 3, 4, 9, and 10. A 1/16 corner was set at a point equidistant from the SE corner, sec. 4 and the 1/4 corner common to secs. 4 and 9. For reasons discussed immediately below, we find this 1/16 corner to have been improperly placed.

This resurvey continued to the 1/4 corner common to secs. 4 and 9, which was determined by BLM to have been found. However, based upon our review of the evidence presented to Judge Luoma, we also find there to be sufficient conflicting evidence to conclude that a reasonable doubt exists as to the location of the corner at the position stated in the resurvey notes. There being a reasonable doubt, the 1/4 corner described in the resurvey notes and monumented by BLM cannot be considered to have been found, and the monument described cannot be deemed a faithful perpetuation of the original corner. We find no error in Judge Luoma's conclusion.

The west 1/16 corner common to secs. 4 and 9 also was established by proportionate measurement between the 1/4 corner and the corner common to secs. 4, 5, 8, and 9. Similarly, placement of the monument on resurvey is not acceptable.

The corner common to secs. 4, 5, 8, and 9 was determined to have been found. Again, a reasonable doubt exists as to the authenticity of the evidence relied upon in the placement of this corner. It cannot be considered to be a found corner at the place designated in the resurvey or a faithful perpetuation of the original corner. We find no error in Judge Luoma's conclusion.

The survey then proceeded in a northerly direction from the corner common to secs. 4, 5, 8, and 9. The southerly 1/16 corner common to secs. 4 and 5 was placed by proportionate measurement. Again, the placement is not acceptable.

The 1/4 corner common to secs. 4 and 5 was determined to have been found. Again, a reasonable doubt exists as to the authenticity of the evidence used by BLM in the placement of this 1/4 corner. It cannot be

considered to have been found, and cannot be considered to be a faithful perpetuation of the original corner. We find no error in Judge Luoma's conclusion.

Appellants have tendered evidence as to the location of the 1/4 corner common to secs. 4 and 9, and the 1/4 corner common to secs. 4 and 5. We also find that a reasonable doubt exists as to the evidence in support of those corners. Generally speaking, however, the placement of the boundary between secs. 4 and 9 more closely matches that described by appellants. The calls more closely agree and the distances between the corners more closely match the boundary placement they propose.

We are troubled by the apparent inconsistency of BLM's position. For example, of the evidence for

the corner common to secs. 4, 5, 8, and 9, only the stone matched. All other evidence was at great variance. The corner was accepted because of the stone. The variances were explained away as sloppy surveying. At another point, the stone was nowhere near that described in the 1881 survey, but accepted, on the basis of there being a sloppy and rushed survey. Evidence of line blazes was discounted because the notes did not make reference to line blazes. At other times BLM took a stance that the survey notes were reconstructed from memory and were not accurate. [40] Appellants' evidence generally supports the accuracy of the 1881 survey. The evidence of discrepancies presented by BLM almost makes a case for a fraudulent survey. The option of conducting an independent resurvey remains open to BLM, and should be considered.

40/ The ability to discount the mass of evidence which tends to disprove BLM's placement of the various corners is not unique to BLM. The dissenting opinion has either elected to ignore this evidence or to blame it on the inaccuracies of the original survey. In doing so, he also has ignored one additional factor crucial to our review of this case. A hearing was held, during which four days of testimony was presented. and over 200 exhibits were identified and admitted. Judge Luoma made a personal examination of the site, including the corners and other physical features. Yet, the dissent has not shown error in his findings, or found it necessary to do so. We recognize that there is no evidence presented by the appellants that, standing alone, would be considered to be "probative," and cause us to come to a conclusion regarding the proper outcome of this case. However, the very argument used by BLM throughout the hearing and on appeal is one of the most probative elements in this case. BLM

argues that "inaccuracies were* * * endemic to the system" when describing the original survey. If the errors were so pervasive to be endemic, that fact alone would render any and all evidence regarding the corners suspect, not just that evidence which did not happen to fit BLM's case before Judge Luoma. If we are to accept the argument that there are "endemic" inaccuracies in the original survey, the fact that these errors are endemic should increase the burden necessary to establish the corner as being the one set at the time of resurvey, rather than decreasing it. If any part of the survey is suspect, it all must be. Otherwise, on resurvey, the tendency will be to pick and choose the evidence in an attempt to justify some result, rather than carefully and independently weighing the evidence.

If a dependent resurvey is made, the possibility that a double set of corners was established along the northern township boundary of T. 11 N., R 21 E., during the course of a subsequent survey in T. 12 N., R 21 E., should be addressed. The change in course of this boundary as depicted in the resurvey of T. 12 N., R. 21 E., but not depicted in the survey of T. 11 N., R. 21 E., is of concern. Any adjustment to the size of the sections in T. 11 N., R. 21 E., should have been made in the northerly tier of sections, thus making sec. 9 a full 640-acre section. If proportionate measurement is used to set the corner common to secs. 4, 5, 8, and 9, care should be exercised to determine if the corner can be more readily determined using reliable topographic calls or other evidence set forth in the 1881 field notes, rather than the corner common to secs. 4 and 5, T. 11

N., R. 21 E., and sec.s 32 and 33, T. 12 N., R. 21 E., which was reestablished in the 1973 resurvey of T. 12 N., R. 21 E. See Survey Manual at 5-16.

In conclusion, we find Judge Luoma's decision fully supported by the facts. A further resurvey was properly ordered. In conducting the further resurvey, BLM shall have the latitude of determining whether this resurvey should be dependent or independent. It shall have the additional latitude of conducting further research regarding the location of the corners described in the 1881 survey. In conducting the resurvey, all evidence noted should be described, including that evidence ultimately rejected. For the rejected, as well as the accepted evidence, a detailed statement of the reason for rejection or acceptance should be set forth in the survey notes. The boundaries of the property of the various parties should be further investigated to determine if, and to what extent these parties may have relied on the boundaries of the 1881 survey (Survey Manual at 5-10). In addition, the holdings of this Board with respect to the "monuments" found by BLM during the conduct of the previous resurvey should be followed unless and until additional supporting evidence of such a nature as to identify the corners beyond a reasonable doubt is found.

Therefore, pursuant to the authority delegated

to the Board of Land Appeals by the Secretary of th
Interior, 43 CFR 4.1, the decision appealed from i
affirmed as clarified by this decision and the cas
is remanded to BLM for further action consisten
herewith.

s/ R. W. Mullen
R. W. Mullen
Administrative Judge

I concur:
/s/ Gail M. Frazier
Gail M. Frazier
Administrative Judge

97 IBLA 220

IBLA 86-4

CHIEF ADMINISTRATIVE JUDGE HORTON DISSENTING:

In an attempt to resolve the actual location o
the boundary between secs. 4 and 9 of township 11
the evidentiary hearing in this case concentrated o
the Bureau of Land Management's (BLM) placement o
two section corners, viz., the southwest corner o
sec. 4 and the northwest corner of sec. 4, and tw
quarter section corners, viz., the quarter corne
common to secs. 4 and 9 and the quarter corne
common to secs. 4 and 5.

BLM's 1982 dependent resurvey contains stron
and convincing on-the-ground evidence that th
disputed section corners are "found" corners. It
evidence of the quarter section corners is les
strong, but under all the circumstances of thi

case, it is my view that only a narrow remand of this matter to BLM is necessary to bring this case to a proper conclusion.

Appellants Jacobsen and Downer challenge the accuracy of the resurvey on the theory that at or about the time of the filing of the 1881 cadastral survey, a system of double corners was created. Specifically, they allege that various corner monuments were fraudulently moved by the original surveyors or others so that the 1881 survey would properly close, thereby entitling the surveyors to be paid for their work (Jacobsen and Downer Posthearing Brief at 1-2). Jacobsen and Downer in fact "acknowledge that in order for this honorable court to determine this matter in their favor, that they must prevail with respect to their contention of the 'double set of corners theory.'" Id. at 12.

The Administrative Law Judge determined the evidence did not support the double-corners theory. That finding should be affirmed. That double corners were employed by the original surveyors or others acting in the same time frame as the original surveyors is partly surmised by Jacobsen and Downer on the basis of notes made by H. W. Reppert, a United States transit man under contract with the United States in 1913, who performed a retracement of several subdivisional lines of township 11, outlining secs.

10, 11, 12, 13, 14, and 15. Reppert's notes opined that double corners were created at the time of the 1881 survey (Hearing Exh. B).[1] Reppert's notes also concluded, however, that overall the 1881 survey was conducted accurately (Exh. B at 10-11; Jacobsen and Downer Posthearing Brief at 4).

Responding to the double-corners theory generally and the Reppert notes in particular, BLM states:

> The only evidence concerning the possible location of double corners within this Township is contained in appellants'
>
> Exhibit B.

1/ At the hearing, exhibits of Jacobsen and Downer, appellants in the proceeding, were identified by letters; exhibits of the Government, respondent below, were identified by numbers. As all parties to the hearing have appealed from the Administrative Law Judge's decision, they are identified here by name.

> Exhibit B demonstrates that, if double corners were found at all, they were found at a point in the Township southeasterly of the points at issue in this appeal. Repert [sic] did not purport to find double corners at any of the locations at issue herein. Furthermore, an examination of Exhibit B indicates that the "undocumented corners" which Repert [sic] found were represented by wooden posts (pine stakes) with no supporting bearing trees (Exhibit B, p.

10 and 11). None of the survey points supported by either party are so marked.

> Appellants, in fact, don't claim to have found double corners at either the southwest or the northwest corner of Section 4. In fact, they originally double proportioned the location of the southwest corner of Section 4 (TR. 362) and single proportioned the northwest corner of Section 4 (TR. 366, 395) because of a lack of any physical evidence on the ground.

(BLM Posthearing Brief at 2).

BLM also takes issue with the Administrative Law Judge's characterization that the Reppert retracement encountered "many spurious corners in the area" (Decision at 2). In its appeal brief, BLM states at page 5:

> In fact, an examination of Exhibit B reflects that this statement is patently not correct. Reppert states that he encountered only two spurious corners in his retracements. These were the quarter section corner of Sections 11 and 14, and the corner of Sections 11, 12, 13 and 14 (Exhibit B page 17), which he states were set by local surveyors (Exhibit B, page 11). These alleged double corners are both more than a mile from the corners at issue in this proceeding.

BLM's observations about the double-corners theory are well taken. Moreover, the most compelling evidence against the double-corners theory is the

persuasive showing that single corner monumentation was found by the resurvey on the ground in accordance with the 1881 survey notes.

As previously stated, the two section corners at issue in this case are the southwest corner of sec. 4 and the northwest corner of sec. 4. The southwest corner of sec. 4 is described in the 1881 field notes as follows:

> Set trachyte stone 24x18x12, in stone mound 4 1/2 feet in diameter at base, by 2 feet in height * * * from which bears a Pine 12 (inches in diameter) N. 80°W. 19 (links distant), Pine 16 (inches diameter) S. 79°W. 23 (links distance), Pine 10 (inches diameter) S. 54° E. 31 (links distant, and) Pine 8 (inches diameter) S. 62° E. 28 (links distant).

Downer, a land surveyor and civil engineer who has conducted several surveys in the subject area on behalf of Jacobsen, located no stone, mound, or trees in the vicinity of the 1881 location of the southwest corner of sec. 4 that fit with his survey lines. He restored what he believed was a lost corner by the double proportionate method of surveying.

BLM's 1982 resurvey purports to have found the

true southwest corner of sec. 4 and the preponderance of the evidence leads to this conclusion. [2] A trachyte stone measuring 22x17x9 was found with markings along with a wood post and rebar set there as part of a private survey conducted in 1980 (the Jones survey). Four uprooted bearing trees were found. The blazes on two of these trees were age-dated by the University of Arizona and were found to have been made in 1881. Jacobsen and Downer aver that all of the bearing trees in the southwest corner of sec. 4 were moved in 1881, having been dragged therefrom someplace else (Tr. II 26-28, Tr. 514). Apart from the fact that no evidence whatsoever was introduced to substantiate this claim, the findings of the University of Arizona Laboratory of Tree-Ring Research showed that two of the trees were living specimens well into the 20th century (Hearing Exh. 29). [1] As explained by BLM, the evidence shows that the above corner was also found by the Nevada State Highway Department in 1939, in addition to the disputed quarter corner common to secs. 4 and 9, discussed infra (BLM Appeal brief at 5-6). From the record

2/ The majority opinion misstates the legal standard for determining whether a corner has been found. After discussing the evidence concerning the southwest corner of sec. 4, it stats: "[W]e find the evidence that the monument identified by BLM as the monument for that corner does not establish beyond a reasonable doubt that the monument represents the position of the corner set in the 1881 survey" (Opinion at 216).

To determine that a corner is found does not require evidence "beyond a reasonable doubt," terminology used in the 1973 Survey Manual to help define obliterated or lost corners (see sections 5-9 and 5-20). Instead, an existent corner is defined at section 5-5 as "one whose position can be identified by verifying the evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or testimony." Consistent with this definition of an existent or known corner, it is said: "If there is some acceptable evidence of the original location of the corner, that position will be employed." (Emphasis added.) Restoration of Lost or Obliterated Corners and Subdivision of Sections, (1974 ed.) at 10. See also Clark on Surveying and Boundaries (3rd ed. 1959) at 365.

3/ In addition, Neil R.Forsythe, who was in charge of the dependent resurvey, testified that "part of the stump or root system [of the southwest bearing tree] was still stuck in the ground" (Tr. II 106). Based on this and the general positioning of the trees,Forsythe was convinced that the bearing trees had "grown there." Id. The majority merely takes note of Forsythe's testimony (Opinion at 213). As it was unrebutted, the proper legal course would be to accept Forsythe's testimony over the claim that the trees had been moved to where they were found. Indeed, Judge Luoma properly concluded that "it is unpersuasive to suggest someone physically moved [the bearing] trees" (Decision at 6). Under section 5-5 of the 1973 Survey Manual, bearing trees are on a par with monuments in locating an existent corner. See Elmer A. Swan, 77 IBLA 99, 103 (1983). Even

accepting the majority's "beyond a reasonable doubt" standard for identifying a corner as found (see n.2, supra., such a standard must be deemed met for the southwest corner of sec. 4 by virtue of BLM's bearing tree evidence alone.

as a whole and in light of the strong, physical evidence discovered by BLM, the majority errs in not determining that the southwest corner of sec. 4 as monumented by the 1881 survey was properly found by the 1982 dependent resurvey.

The Administrative Law Judge's decision does not set forth a definitive ruling on the accuracy or lack thereof of BLM's location of the northwest corner of sec. 4. BLM submits that this is a found corner as "supported by a scribed rock and bearing trees whose blaze marks were age-dated and found to have been made at the time of the 1881 original survey (Tr. 366, 395-6)" (BLM Posthearing Brief at 8). The majority concludes that in view of the scribed stone and the blazed bearing trees, it cannot be said that this corner is lost. Indeed, the majority concludes "that the corner has been found, regardless of any discrepancies in record calls to known corners" (Opinion at 210). I would agree.

It having been established that the two disputed section corners are where BLM maintains, BLM's final decision on the protest to its dependent resurvey

provides an apt assessment of the effect thereof: "The SW. and NW. corners of section 4 are definitely fixed by the original corner evidence. Therefore, the relationship of these corners to corners of surrounding sections to the north, south and west are irrelevant, and beyond the scope of the assigned resurveys under this project" (BLM's July 5, 1984, decision at 4).

Jacobsen and Downer challenge BLM's location of the quarter corner common to secs. 4 and 9, maintaining that their own survey shows a different location that closely matches the calls recorded in the 1881 survey notes. The evidence adduced on this issue is considerable and is discussed in detail by the majority.

Although BLM was unable to find the original monument for this quarter corner, in my view neither the majority opinion nor the Administrative Law Judge's decision attributes proper weight to certain extrinsic evidence of record, including a 1939 map prepared by the Nevada State Highway Department which shows the subject corner had been "found" (Hearing Exh. 6D). Two highway monuments were set based on the found corner. The record also shows that conveyances of land were made on the basis of the quarter corner found by the Highway Department in 1939 and its earlier discoveries of the corner in

the same location made in 1917 and 1919 (Hearing Exhs. 5, 7, and 8; BLM Appeal Brief at 3,6). The location of the corner as made by the Highway Department in 1917, 1919, and 1939 coincides with the place of discovery by the 1980 Jones survey of a rock mound which the surveyor and BLM submit was made to remonument the original corner (TR. 227-233; BLM Posthearing Brief at 4).

The majority states the "bona fide character" of the State Highway Department's location of the quarter corner cannot be tested and that it is not supported by other collateral evidence showing a "proper relation to

know corners." In regard to the latter, the majority emphasizes that the bearing between the southeast corner of sec. 4 as set forth in the dependent resurvey and BLM's location of the quarter corner results in a 5-degree deflection of the connecting line. This fact was also influential in the Administrative Law Judge's decision ordering a resurvey (Decision at 12-13). It cannot be said, however, that the quarter corner common to secs. 4 and 9 as recorded by the resurvey does not bear a proper relation to the southwest corner of sec. 4, previously shown to be a found corner. BLM's 1984

decision denying the protest to the resurvey explained, based on a comparison of topography calls and bearings and distances, that: "It is apparent this [quarter] corner was stubbed-out easterly from the cor. of secs. 4, 5, 8 and 9 [southwest corner of sec. 4], as proposed in the original field notes" (Decision at 5).

BLM does not deny the 5-degree deflection in the south line of sec. 4 occurring between the quarter corner and the southeast corner. Instead, it offers a plausible explanation for this deviation and a solution:

> Judge Luoma appears to give great significance to the fact that the location of BLM's south quarter corner of Section 4 creates a 5° bend in BLM's south section line. In its survey BLM accepted the corner of Sections 3, 4, 9 and 10, which in fact resulted in the 5° deflection described in Judge Luoma's opinion. At the corner of Sections 3, 4, 9 and 10, BLM did not find any evidence of the original corner monument or bearing trees, and accepted a monument established by Mr. Jones in his survey of 1980 (TR. 275-6, 365). In fact, Forsythe testified "We did not find the corner of 3, 4, 9 and 10. We accepted evidence that was used by other people. We felt that that was not the corner but we couldn't prove it so we accepted that . . . ." (TR. 276).
>
> On a re-survey, BLM would consider re-establishing the corner of Sections

3, 4, 9 and 10 by the double proportionate measurement, rather than accepting the corner as re-established by Jones. Using Reppert's retracement data (Exhibit B) and the 1982 BLM survey data, and providing that no intervening corners could be found, the proportionate position for the corner of Sections 3, 4, 9 and 10 would be about 0.75 chains south and 2.60 chains east of the accepted corner position. The approximate bearings and distances between the corners would be as follows:

1. The north 1/2-mile between Sections 9 and 10 - north 2° 17' east, 39.35 chains.

2. Between Sections 3 and 4 - north 2° 3' west, 78.56 chains.

3. East 1/2-mile between Sections 4 and 9 - south 86° 13' west, 39.75 chains.

4. The tie from the corner of Sections 1, 2, 11 and 12 to the corner of Sections 3, 4, 9 and 10 - 89° 04' west, 158.83 chains.

Re-establishing the corner of Sections 3, 4, 9 and 10 by this method would reduce the five degree deflection in the bearing t the quarter section corner of Sections 4 and 9 and result in the distance of the east 1/2-mile between 4 and 9 being nearly that of record. The tunnel would then be on the section line instead of one chain north as the 1881 record states.

> * * * A new survey by BLM as ordered by Judge Luoma would double proportion the southeast corner of Section 4 in the manner described, but would not change the location of the corners at issue in this appeal.

(BLM Appeal Brief at 3-5).

The above proposal is reasonable and should be followed. The alternative sought by Jacobsen and Downer, acceptance of their line as more nearly approximating the calls, bearings, and distances described in the original survey, is not reasonable. Even the majority is unpersuaded by much of the evidence submitted by Jacobsen and Downer regarding their location of the quarter corner. See discussion of related calls to a quartz ledge, top of a ridge, tunnel, and gulch crossing. On the other hand, the majority is favorably impressed by evidence submitted by Jacobsen and Downer showing two blazed trees near their south line. Such evidence is not very probative in my opinion and, as the majority allows, there is "no mention of line trees in the 1881 survey field notes." It also appears that one of the alleged line trees was age-dated to earlier than 1881 (BLM's July 5, 1984, decision at 11).

The parties each have intricate versions of how their respective location of the quarter corner best matches the original survey call to "Carter's

Station" or "Carer's House" and the Bodie road. The majority ultimately concludes that BLM's quarter corner does not match the calls to these sites but that the quarter corner location posed by Jacobsen and Downer does. As stated by BLM, there are many explanations which may be given for discrepancies between the notes of the 1881 original survey and what actually appears on the ground. Referring to testimony as to how the survey of 1881 surveyed 70 miles of line in 7 days and how other old surveyors were able to keep up such a pace, BLM states that "inaccuracies in the descriptions of monuments or bearings were endemic to the system" (BLM Appeal Brief at 6). [4] Since BLM has requested the opportunity to reduce the deflection in the south line of sec. 4 by reestablishing the southeast corner of the section, definitive rulings by he Board on those isolated calls is unnecessary.

4/ Hearing Exhs. 49, 50 and 51 compare the information found on the ground with the old surveyor's notes for township 11 and two adjacent townships surveyed by Stewart and Conkling under the same 1881 contract. Inaccuracies in the descriptions of sizes of monuments, bearings, and distances are prevalent throughout all three townships.

The fourth, disputed corner at issue in this case is the quarter corner common to secs. 4 and 5. Both sides claim to have found the original corner

monument as summarized in the majority opinion. The majority declines to rule that the monument stone found by Jacobsen and Downer is the true monument absent "conclusive proof that there is a 1/4 marked on the stone," a fact very much in contention. Essentially, the majority's position is no different than where the Board was 2 years ago when we were "troubled by the apparent fact that the monument accepted by BLM does not approximate, either in composition or size, the stone denoted in the 1881 survey, while appellants' stone apparently does." Stoddard Jacobsen, 85 IBLA 335, 341 (1985). In my judgment, after a full and complete evidentiary hearing in this case, Jacobsen and Downer have failed to prove by a preponderance of the evidence that BLM's identification of the original corner monument is not correct. [5]

We are however much further along than when we remanded this case for a hearing in 1985. In our previous decision, we were of the opinion that the northwest corner of sec. 4 had not been established. Based on the present record, the majority properly concludes that BLM's resurvey found the original corner monument. This is a significant conclusion which, in tandem with the found southwest corner of the section, renders it unnecessary to prolong the debate over whether cuts in the stone found by Downer

were manmade or if they resemble a "1/4" marking. BLM's quarter

5/ The relevant evidence is summarized by BLM as follows:

"Evidence as to the location of the west quarter corner of Section 4 conflicts so greatly that the court was asked to go to the scene and view the evidence itself. Appellants [Jacobsen and Downer] assert that the west quarter corner of Section 4 is monumented by a stone in place, having dimensions above the ground similar to those called for by the field notes of the 1881 survey (exh. 3). BLM's corner consists of a granite stone substantially smaller, but clearly marked with a 1/4 in the west face of the stone (Exh. 54). The 1881 field notes state that the west quarter corner of Section 4 was set, as opposed to being identified as a rock in place. BLM vigorously disputes the fact that appellants' stone is marked at all, hence the reason for the court's visit.

"Neither surveyors Forsythe nor Neitz were willing to accept Mr.Downer's newly discovered in-place monument. Likewise, Mr. Eugene Faust, a cartographer for the State of Nevada, testified that, having had occasion to examine section corners of various kinds for more than 35 years, he would clearly accept BLM's monument, but did not feel that appellants' monument was correct (Tr. 293-4). BLM's Chief of Cadastral Survey, Reno, Nevada, Lacel Bland, after having examined both Mr. Downer's rock in place and the stone depicted in Exhibit 54 [BLM's stone] concluded that there was no way to determine the age of the marks on Exhibit 54, but pointed out that the cadastral surveyors stopped marking corners by scribing stones in 1910 (Tr. 329). He, too, supports the location reestablished by the Jones survey which is identical with the position of the corner as shown on the 1939 highway right-of-way map. (Exh. 6)." (Emphasis in original.)

corner common to secs. 4 and 5 was deemed by the resurvey as lying in proper relation to the section corners one-half mile to the south and north. Since the proper decision in this case is to affirm BLM's location of these section corners, its placement of

the quarter corner on line with these locations should also be affirmed.

Jacobsen and Downer have developed a massive record seeking to show substantial error in BLM's resurvey. With limited exception, their evidence relies on differences in distance and bearing to calls recorded in the original survey. They acknowledge that the efficacy of their case hinges on acceptance of the theory that double corners were fraudulently established at the time of the original survey. As earlier explained, the double-corners theory does not hold up. Moreover, the Board has recognized that on-the-ground evidence of corners is entitled to greater weight than discovered variances in record calls. Robert J. Wickenden, 73 IBLA 394 (1983). As stated in United Stats v. Weyerhaeuser Co., 392 F.2d 448, 451 (9th Cir. 1967), the wisdom of centuries of land law recognizes "that lines marked on the ground by monuments stand highest in the determination of the true boundaries of conveyed land, ranking above statements of directions, distances, or area * * *."

The large scale resurvey ordered by the majority is unwarranted and would undoubtedly result in these same parties appearing before us again debating the same or cumulative evidence. Jacobsen and Downer have not proved by a preponderance of the evidence

that the 1982 dependent resurvey is erroneous such that a complete resurvey should be held. On the other hand, BLM is amendable to reestablishing the southeast corner of sec. 4, which the record cannot be fabricated to show is a properly remonumented corner if, in fact and in law, it is not. See United States v. Williamson, 45 IBLA 264, 276 (198). The procedure suggested by BLM should be ordered by the Board pursuant to its de novo review authority so as to reduce the deflection in the south line of sec. 4.

/s/ Philip Horton
Wm. Philip Horton
Chief Administrative Judge

97 IBLA 228

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARING AND APPEALS
HEARINGS DIVISION
2020 Hurley Way, Suite 170
Sacramento, California 95825

September 27, 1985

STODDARD JACOBSEN and ROBERT C. DOWNER, Appellants v. BUREAU OF LAND MANAGEMENT, Respondent	: IBLA 84-762 : : DEPENDENT RESURVEY : : Appeal From State Director's Decision dated July 5, 1984, Nevada

DECISION

Appearances: Peter L. Knight, Esq., Minden, Nevada, for appellant Jacobsen; John P. Davis, Esq., Minden, Nevada, for appellant Jacobsen; Thomas J. Ray, Esq., Carson City, Nevada, for appellant Downer; Burton J. Stanley, Esq., U.S. Department of the Interior, Office of the Solicitor, Sacramento, California, for respondent.

Before: Administrative Law Judge Luoma

By decision dated March 22, 1985, (85 IBLA 335), the Interior Board of Land Appeals (IBLA) referred this matter to the Hearings Division for a hearing and decision.

The issue for determination is the validity of a dependent resurvey conducted by the Bureau of Land Management (BLM) of the subdivisional lines between Sections 3 and 4, 4 and 5, 4 and 9, and 9 and 10, Township 11 North, Range 21 East, Mount Diablo Meridian, Nevada. The main issue of contention is the location of the South line of Section 4 as determined by BLM.

In its decision, IBLA ruled that:

> Appellants will have the burden of proving by a preponderance of the evidence that the lines and corners as determined by BLM in its 1982 dependent resurvey, do not depict the original survey lines (1881).

Hearings in this matter were held on June 19-21, 1985, at Reno, Nevada, and June 25, 1985, at Minden, Nevada.

BACKGROUND

In August of 1881, Mr. T. K. Stewart and Mr. G. W. Conkling, U.S. deputy surveyors under contract with the United States, surveyed Township 11 North, Range 21 East, Mount Diablo Meridian, Nevada. Their field notes detailed the ties and monumentations of the lines and corners of the township's sections, including the presently disputed boundaries of Section 4. In April of 1913, Mr. H. W. Reppert, a U.S. transit man under contract with the United States, performed a retracement of several subdivisional lines of the township outlining Sections 10, 11, 12, 13, 14 and 15. According to Reppert's notes, he encountered many "spurious" corners in the area. These corners are close to, but are not adjacent to Section 4. In April of 1973, Mr. Neil Forsythe, a cadastral surveyor with BLM, resurveyed Township 12 North. Forsythe's conclusions are cited by BLM as evidence of their north boundary of Township 11. In 1980, Mr. Jimmy Jones, a registered land surveyor, surveyed Section 4 for the Veta Grande Companies. His survey supports BLM concerning the position of Section 4. Finally, in 1982 Mr. Robert Pratt, cadastral surveyor for BLM, performed a dependent

resurvey of Township 11. His findings are disputed by appellants.

Appellant Downer, a land surveyor and civil engineer for over 50 years, has performed several surveys of the Township 11 area. His most recent survey is dated March 23, 1983, and forms the basis of appellants' grievance. Appellants contend that their survey, not BLM's, is an accurate representation of the original 1881 survey. Specifically, appellants contend they have located the north line of Township 11 North, Range 21 East, Mount Diablo Meridian, Nevada, and have correctly determined the boundaries of Section 4. Pursuant to 32 CFR 4.450-4.4502, appellants protested BLM's dependent resurvey. BLM dismissed the protest. Appellants appealed to IBLA, which referred the matter here.

A dependent resurvey is a retracement and re-establishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. United States Department of the Interior, Manual of Instructions for the Survey of the Public Lands of the United States, 1973. If the original corners cannot be found through monumentation or points of control, the lost corners are restored by proportionate measurements, which is measuring to two or more interdependent corners in accordance

with the original survey. Elmer A. Swan, 77 IBLA 99 (1983). Since the issues to be resolved are primarily factual in nature discussion of BLM's survey, appellants' survey, and the original 1881 survey will constitute the primary analysis. Each disputed corner and quarter corner of Section 4 will be examined by comparing the monumentation and calls of the original 1881 survey to those of the parties.

EVIDENCE PRESENTED

South Line of Section 4 (or North Line of Section 9)

In his 1881 field notes, Conkling commenced an easterly random line from the southwest corner of Section 4 to the southeast corner of Section 4. He listed several calls and monuments along this line, including the distance between the two corners. The southwest corner is in contention, and the southeast is not. Accordingly, the calls will be recited westerly from the accepted southeast corner.

Conkling's first call westerly from the southeast corner of Section 4 is a quartz ledge, 2.72 chains in distance. Downer's distance is 2.7 chains. BLM did not testify to this call, but the proximity to the accepted corner renders it insignificant. At 19.72 chains west from the southeast corner of Section 4, "a tunnel bears south, one chain." Downer contends the tunnel is 1.39 chains south of this line; BLM claims Downer's distance is

1.8 chains. BLM contends their south line of 4 is slightly north of the tunnel, or directly on it. Downer claims BLM's line is actually 1.5 chains north of the tunnel. Forsythe offered no explanation for BLM's discrepancy, other than mentioning many old surveys were inaccurate as to distance.

The next westerly point on the south line from the southeast corner of 4 is the quarter corner of Section 4. In his 1881 field notes, Conkling wrote "set post * * * in earth mound * * * and dug pit for 1/4 sec. cor. * * * Pine, 10" dia., N 80° w, 70 links distant." In his appeal letter dated August 28, 1984, Downer noted he found this stump (which BLM said is 9 1/2 inches in diameter). It is the only stump within 100 feet or more of this point. Mr.Walter Neitz, a licensed land surveyor, testified that surveyors usually mark two trees at a quarter corner, and four trees at a section corner. The fact that only one tree was noted in the 1881 field notes and the fact that only one tree stump was present within 100 feet of Downer's stump suggest the point's validity. Downer did not find the wood post, and suggested the earth mound had been washed away over the years. BLM used Jones' survey to establish their point. Neitz, who did the actual survey under Jones' supervision, could not find any monumentation where he felt the correct point was. He used a 1939

State of Nevada highway map to estimate the point. He then dug down about 18 inches and found what he believed was the remnants of a rock pile. He then reconstructed it by assembling the rocks he found into a pile. However, Neitz testified these rocks were not a part of the original 1881 monumentation, since the notes called for an earth mound. Instead, the rocks were placed there to "remonument" the point. Neitz guessed that might have been 50-60 years ago. He also found a badly decayed nine-inch tree stump near the point.

A problem with BLM's south quarter corner of Section 4 is that it creates a 5° deflection in BLM's south line. Downer contends this is a very obvious surveying error which no surveyor wold create. Neitz himself testified a reasonable surveyor would be put on notice by this deflection.

Aside from monumentation description, another clue as to the location of this quarter corner is the tie to Carter's Station, whose remnants are still visible, given in the field notes as "S. 12 1/ 2° E. 16 chains distant." The given point on the south line going towards Carter Station is three chains to the west of the quarter corner. Three chains west of Downer's quarter corner on his south line of Section 4 towards Carter Station turn at an angle of 12°, and is 15.5 chains in length. This is

to the foundation of the Carter Station barn. Perhaps because they picked a slightly different point in Carter Station to measure to, derived from maps and a "[h]ighway field book," BLM contends Downer's angle is not 12° but 19°, and is 16.98 chains instead of 15.5 chains from the station. From BLM's point three chains west of the Jones quarter corner, BLM contends a 14° angle is formed to Carter Station measuring 12.73 chains.

Although the Downer tie to Carter Station appears to be the closest to the record both in angle and distance, I observed this point facing Carter Station, which was blocked from view by a hill between the two points. BLM contends that in order for Conkling to have turned an angle to Carter Station, the station must necessarily have been in his line of sight. They contend that the 1881 surveyors either turned to the station when it became visible, or that they marked the south quarter corner of Section 4, backed up (they were proceeding west to east) until they could see Carter Station, then angled and measured. On the other hand, Downer contends Conkling might have started at Carter Station and worked his way up to the line, and calculated the angle by starting from Carter Station.

Proceeding westerly, the 1881 field notes next mention "Cross Stage Road to Bodie, bears NE and SW

* * *" at 28.5 chains from the southwest corner of Section 4. While this description seems simple enough, the location of Bodie Road is in contention by Downer and BLM. The road was used for horse travel in the 1800's and has long since been abandoned. From where Downer contends is Bodie Road, his south line of Section 4 matches the 1881 field notes by 10 feet. As evidence of the road's location, Downer referred to a 1923 State of Nevada Plan and Profile Highway Map which he claimed outlined Bodie Road, but which labelled it the "travelled way."

He testified:

> We found huge drayhorses' shoes (horseshoes from work horses) * * *. And it was very obvious, the opening through the trees, although it had been many, many years. There was still an opening through there and to go to the other route, there would have trees [sic]. They would have had to dodge around trees. So that was the obvious road. Before the fire, it was quite apparent that it went down through this gulley here (indicating) and up here (indicating). So we were satisfied with that and it was very close to proper distance on call.

From where BLM contends is Bodie Road, their south line of Section 4 matches the 1881 field notes by three feet. BLM introduced a 1893 reconnaissance map, a 1938 aerial photo of Sections 4 and 9, and a

1974 orthophotoquad map to support where they clai
Bodie Road is located. Mr. Eugene Faust, a
cartographer for the State of Nevada, testified a
particular bend in a road visible in the maps
demonstrates the direction of Bodie Road, and claime
the road's intersection with the west and south lin
of Section 4 can be ascertained from the maps. Downe
discredited the maps' accuracy and claimed the smal
scale of the maps rendered them unreliable. He als
claimed BLM's Bodie Road is actually a detour roa
built for the construction of Highway 395, and claime
the 1923 State of Nevada Plan and Profile Highwa
Map, plus a 1923 State of Nevada Detour Sketch
outlined the detour intersecting the south and wes
border of Section 4. BLM questioned why the detou
would be apparent in a 1938 map when the highway wa
built in 1940. Downer claimed detours for Highwa
395 were built years before the highway. He personall
worked on a stretch of this highway just south o
Carter Station, where a detour was also built
Furthermore, the detour was in the 1923 highwa
plans, further suggesting its construction befor
the highway. By letter dated March 23, 1983, appellan
Jacobsen noted that as a child he personally travele
the original Bodie Road, and that it is "not th
graveled detour road which lies to the west of th
existing state highway."

The next point given in the field notes is "cross Bodie Telegraph line, bears NW and SE," at 27.5 chains from the southwest corner of Section 4. The telegraph line was destroyed many years ago, but northwest where Downer's line lies, he found two wooden telegraph wire insulators in trees. One was 100 feet from his line; the other 300 feet from his line. Downer claims the telegraph would have crossed his line at or near the given distance in the field notes. BLM offered no evidence contradicting or discrediting Downer's claim.

At 24 chains east of the southwest corner of Section 4, or 55.72 chains west of the mutually accepted southeast corner of Section 4, the notes read "[c]ross gulch, 20 links wide, course NW." Downer meets this call within five feet, BLM meets it within 20 feet. Both parties' measurements are close to the record because the creek makes a southeast bend from Downer's south line of Section 4 to BLM's south line of Section 4. In Downer's August 28, 1984 appeal letter, he noted strong tree line cuts on his line near the creek have been recently destroyed by fire.

Finally, the southwest corner of Section 4 is described in the 1881 field notes:

> Set trachyte stone 24x18x12, in stonemound 4 1/2 feet in diameter at base, by 2 feet

> in height * * * from which bears a Pine 12 (inches in diameter) N. 80 ° W. 19 (links distant). Pine 16 (inches diameter) S. 79° W. 23 (links distant), Pine 10 (inches diameter) S. 54° E. 31 (links distant, and) Pine 8 (inches diameter) S. 62° E. 28 (links distant).

Downer located no stone, mound, or trees in the area that fit with his line. He restored what he believed was an obliterated corner by the double proportionate method whereby an original corner north, south, east and west is tied to the corner by measuring their original distances. One of the proportionate corners he used was his own south quarter corner of Section 4. BLM produced very strong physical evidence of what they contend is the true corner. Four uprooted blazed bearing trees were found. Two blazes were age-dated to 1881, the year of the original survey. A trachyte stone measuring 22x17x9 was found with markings, along with a wood post and rebar set there by Jones. Forsythe testified the trees were near stump holes. Downer testified the markings in the stone looked fresh to him, and suggested the trees had been moved to the area because they were not lying in their natural position. While the former observation might have merit, it is unpersuasive to suggest someone physically moved these trees. Forsythe testified the trees were lying naturally,

one 30 feet away from another, and suggested the wind blew them to their positions. Worth noting, however, is the fact that all the trees are considerably (up to 50%) smaller in diameter than the trees in the 1881 field notes. They also do not match the field notes in distance, and are particularly off from the field notes in angles. Furthermore, Downer claims there are larger trees within 10 feet of BLM's corner that should have been blazed.

While these discrepancies are disturbing, they do not in and of themselves disprove BLM's physical evidence of the corner. As IBLA noted, "discrepancies between bearings and distances in old and more recent surveys are not uncommon and are not sufficient alone to disprove the re-establishment of a corner." Accordingly, appellants must present clear and convincing evidence disproving BLM's corner. A look at other evidence besides the field notes concerning the south line's location will assist in determining whether appellants have met their burden of proof.

Downer's extrinsic evidence included the "Carter Homestead," originally purchased by Mr. William Carter and later purchased by appellant Jacobsen. After this area was surveyed and the official map signed on October 27, 1881 by the Surveyor's General Office,Carter took advantage of the Homestead Act of 1862 and applied, in December 1881, for 160 acres,

the E-1/2 NW-1/4 and W-1/2 NE-1/4 of Section 9. This borders the line of contention, the south line of Section 4. Carter's Homestead papers were signed by President Chester A. Arthur on June 1, 1882. Jacobsen recorded his deed in September, 1915, which said "160 acres according to the official plat of the survey of the public lands, as made by the United States Surveyor General * * *" and which was signed by Governor J. W. Adams. Appellant Jacobsen and previous owners have been paying taxes on this land, and have been using the full 160 acres for over 100 years. The 1882 patent issuance of 160 acres remains as such with Downer's south line, but is reduced by 22 acres if BLM's south line is used. Downer claims that a blazed juniper tree, which was age dated to 1881, was used as the "entryman's corner" for the Carter Homestead. This tree lies on Downer's line and is very close but not on the northwest corner of the Carter Homestead. It is not mentioned in the 1881 field notes.

BLM's extrinsic evidence included a 1939 Nevada State Highway Department map, a land deed purchased by the Nevada State Highway on November 8, 1940, and Jones' survey of 1980. The map, deed, and survey each delineate the south line in accordance with BLM. However, no testimony was proffered explaining the methodologies of the Nevada State Highway's

arrival at their boundary, nor, other than the aforementioned reasons for their own survey, why Jones' survey is truer to the 1881 field notes. The conclusions that can be derived from such evidence is therefore limited.

West Line of Section 4

In his 1881 field notes, Conkling commenced a northerly random line between Sections 4 and 5. At 38 chains from the southwest corner of Section 4, or 2 chains south of the west quarter corner of Section 4, he "crossed gulch, 25 links wide, course NW." BLM contends Downer is off from the notes two-thirds of a chain, and that they are off by one-third of a chain. Downer contends he is off by one-half of a chain, and suggested that the creek could have shifted over the years.

The next northerly point in the field notes is the west quarter corner. At 40.35 chains from the southwest corner of Section 4, Conkling "set trachyte stone 42x22x20 in stone mound, (four feet) in diameter at base, by (two feet) in height." Downer found a large trachyte stone, measuring 42x24x22. The stone, Downer claims, has a badly weathered but definite "1/4" chiseled on its face. To support his contention, Downer introduced two witnesses who viewed the rock, Mr. Dave Duryee and Dr.Robert E. Jones. Jones, a consulting geologist, testified as to the alleged

chisel marks, and by letter dated August 21, 1984, stated:

> The slash between the 1 and the 4 has been chiseled along an existing natural crack in the rock, a site where any prudent man would pick as a point of weakness. Both the 1, above, and the 4, below the slash have been cut to at least 1/4 [inch] in places.

BLM contends there are no marks on the Downer's stone, and that the marks Downer claims are from a chisel are in fact from a crack in the rock. Instead, BLM's quarter corner is evidenced by a granite stone, 14x6x4, with an obvious "1/4" chiseled on its face. A mount of stone surrounds it. Downer contends the "1/4" appears freshly made, notes the stone is not a trachyte one, and that the stone is six inches high. Counsel for both parties had me observe their respective quarter corner stones in the field. My untrained eyes failed to detect what I could consider to be man-made markings on the Downer stone.

Although Downer is of the opinion that the marks on BLM's markings look "fresh," the practice of scribing such stones terminated in 1910. Without further evidence of who made or how the alleged new marks were made, Downer's opinion is not convincing. More disturbing about BLM's rock is the fact that the stone is not a trachyte stone, as noted in the

field notes. Furthermore, BLM's stone is much smaller than the notes 42x22x20, enough so to be easily carried from one place to another. BLM attempted to show that "setting" a rock may mean lifting it and placing it in a desired position, thereby increasing the dimensions of their stone by a few inches since its measurements were originally taken at surface level. However, Downer contends it was common practice to use the word "set" to mark a rock, not necessarily move one. Furthermore, to move a 42x24x22 rock, which could easily weigh thousands of pounds, is not a reasonable proposition, unless the field notes contain incorrect measurements. However, it seems unlikely the field notes are describing a six-inch high stone.

Forsythe testified that a surveyor could definitely not use a boulder as a monument unless it fell directly on line. Downer testified a surveyor might deviate off the line to mark a stone, but only by a few feet. This strict adherence to position could imply one of two things. The probability that Downer's particular boulder fell directly on line is small. Since it is too large to move, the probability of this particular stone being directly on Downer's line is even smaller. Conversely, Downer testified his large boulder is the only one of its kind in Sections 4 and 5. BLM disputes this. If the rock is

indeed of the dimensions given in the field notes, and there are no other rocks of its ind in the area, Downer's rock has to be the true monument. As a final note, BLM's rock has discrepancies from the field notes which are ascertainable, namely the type and size of the rock. These characteristics are empirically provable. Downer's rock has an alleged discrepancy which is not easily provable one way or another, namely whether or not a "1/4" has been chiseled on its face.

Proceeding northerly, the 1881 field notes note "cross road to Bodie, bears NW and SE" at 3.5 chains from the quarter corner. Again, Bodie Road's location was disputed. From Downer's point, his quarter corner is 3.3 chains from Bodie Road, while BLM's is 6.5 chains. From BLM's point, their quarter corner is 3.2 chains from Bodie Road, while Downer's is 2.11 chains.

Finally, the 1881 field notes describe the northwest corner of Section 4"set trachyte stone 20x10x8 in stone mound * * * from which bears a [p]ine 12 (inches diameter) S. 28° N. 25 (links distant), [p]ine 6 (inches diameter) S. 57 3/4 ° E. 20 (links distant)." Downer found no stone or trees where he felt the correct point should be so he double proportioned the corner, using the 2 northwest corner of Section 33, the northeast corner of Section

4, the southwest corner of Section 9, and the disputed corner of Section 5. Downer claims the distances from his point match the above corners, Bodie Road, and the creek "perfectly." Also, the call to the mutually accepted southwest corner of Section 8 matches Downer's point. Again, both trees dated to 1881, but again, both trees did not match the field notes in distances, bearings and diameters. One tree is particularly off from the notes (the notes say 6 inch pine, 557 3/4 E. 20 links distant, BLM's is a 12 inch pine 574.5 E., 45 links distant). Downer also found "old line cuts" on his west line of Section 4, although none are mentioned in the notes.

Double Corners

Downer does not contend no corners exist where BLM claims they do. On the contrary, he fully acknowledges the existence of several of the corners. He further believes they were set there in 1881, the year of the original survey. To support his theory, he introduced Reppert's retracement of nearby sections in Township 11. Reppert found many "spurious" corners in his survey, and concluded the corners had either been moved or double corners initially set. Reppert's retracement initiated from an Indian who claimed land was being fraudulently taken from him by an incorrect survey. Downer also introduced evidence

of a double corner in the northwest corner of Section 5, and claimed they were also evident in the south quarter corner of Section 4, the west quarter corner of Section 4, and the north quarter corner of Section 4. As to any possible rationale for the existence of two sets of corners, Downer suggested either someone might have wanted to gain land in an unscrupulous manner, or that the initial survey was done incorrectly, then incorrectly "corrected."

This latter theory was elaborated by Downer's protest letter dated March 23, 1983:

> To explain how this (the double corners) could have happened, we should look at the township line between T. 11 N. R. 21 E. and T. 12 N. 21 E. It is apparent that Stewart and Conkling, the Deputy Surveyors who contracted with the Surveyor General's office in Virginia City, to survey these townships in June of 1881, ran the random line for this township from east to west, setting a temporary corner every half mile. They arrived at a point 210 links south of the western township corner set in 1861. An error of 210 links in 6 miles is 0°15'. So they ran S 89°45' E. on the true corners every half mile. Presumably then the true line lay north of the random line.
>
> There are two rows of rock mounds along the township line about 200 feet apart north to south.

Later, in the same year, the subdivisional

section lines were surveyed in T. 11 N. R. 21 E., starting at the south and checking into the true (northerly) township line on the north.

The 1881 "Instructions to Deputy Surveyors" Section 99, Paragraph 5, specifies "* * * where the lines of a township do not extend 6 miles the excess or deficiency shall be specifically noted and added to or deducted from the western and northern ranges of section or half sections in such township.

The notes show that the line between Sections 4 and 5, T. 11 N. R. 21 E., was closed into the township line and that there was 0.34 chains in excess. When the line between Sections 32 and 33, T. 12 N., R. 21 E., was surveyed, they record 80 chains from he true township line to the NW corner Section 33.

The distance from the northerly of the two rock mounds on the township line to the NW Corner Section 33 checks within 1/3 chain of record 80 chains. The distance from the southerly of the two rock mounds is 82.7 chains, 2.7 chains more than record. Obviously, the northern rock mound is on the true line.

One mile west along the township line a similar situation exists. There are two rock mounds about 230 feet apart north to south. The northerly mound is 3 chains south of the old road, exactly as called for in the notes for the section line between Sections 31 and 32 T. 12 N. The southerly mound is 6 chains south of the old road, 3 chains more than record. Obviously, again the northerly mound is

on the true line. The northerly rock mound also matches a call to a road 29 chains north and to a ravine 31 chains south, as well as the record distance to the SW Cor. Sec. 8.

However, when running south from the true northerly township line, we find that the corners do not match record and are 3 chains too far south. But, if measured from the rock mound on the random township line, the distance matches record distance, but the calls do not fit. The distance to the SW Cor. Sec. 8 is 2.6 chains short.

The answer is apparent. After the township line and section lines were all surveyed, notes and platted, the corners of Sections 4 and 5 appeared to have been moved south 3 or 4 chains.

This is obvious because the north-south dimensions of Sections 8 and 9 have been reduced by similar amounts, 3 chains more or less, while Section 33 was increased by 3 chains more or less.

Fortunately, the calls to the tunnel and Carters as well as calls to the creek, telegraph line and Bodie Trail Road record the true location on the ground of the north line of Section 9 and the Carter homestead. The excellent line cuts and double blazed line trees as well as the N-1/4 corner of Sec. 9 as relocated from what we believe to e the stump of the 1881 bearing tree serve to record the official survey line.

Appellants introduced evidence showing that

the majority of BLM's corners were consistently off in distance from the disputed corners by an average of 230-240 feet, and always in the same direction. The same holds true with the corners' distances to other record calls. Appellants' corners were shown to be off in distance from undisputed corners by less than one-fourth the average of BLM, and were random in direction. The same also holds true with the corners' distances to other record calls.

FINDINGS AND CONCLUSION

Normally monumentation provides the strongest evidence as to the true location of a corner. BLM's age-dated trees are without doubt the strongest evidence presented as to the original location of the southwest corner of Section 4. However, appellants' monuments have merit, although none are as convincing as the age-dated trees. Appellants' pine stump in the south quarter corner of Section 4 is close to the record in dimensions, and is the sole stump within a 100 foot radius. It appears more convincing than BLM's reconstruction of a purported monument. Appellants' 42x24x22 stone at the west quarter corner of Section 4 is nearly identical in dimensions to the record. Although the existence of a chiseled "1/4" remains uncertain, the composition and size of BLM's rock does not.

The most disturbing feature of BLM's re-survey,

however, is the complete non-conformity to the record calls. Most of BLM's calls are off by approximately three chains, and always in the same direction. Appellants' distance to Carter Station is closer to the record distance. The telegraph insulators found by appellants were not contradicted by BLM. The record tunnel distance is substantially closer to appellants' line. The five degree bend in BLM's south line of Section 4 was described by BLM's own witness as being unreasonable. Finally, BLM's small scale maps purporting to show the location of Bodie Road are not as convincing as appellants' detour map, highway map (which depicted Bodie Road as the travelled way), and testimony.

To accept appellants' line as a correct retracement of the original survey is dependent on whether double corners exist. The evidence presented cannot support such a finding. On the other hand there appears to be so many deviations from the original calls and distances in BLM's re-survey as to cast doubt on its accuracy. Accordingly, I see no alternative but to remand the case to the BLM for a resurvey, a solution suggested by the Board's remand decision.[1]

/s/ L. K. Luoma

Administrative Law Judge

APPEAL INFORMATION

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. The name and address of the adverse party to be served with a copy of the notice of appeal and other documents appears below. The appeal must be filed with the Office of Hearings and Appeals, 4015 Wilson Blvd., Room 1123, Arlington, Virginia 22203 (due to closure of the Sacramento office).

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1 As the parties are aware I was unfortunately placed under severe time constraints in the preparation of this decision because of the untimely closure of the Sacramento hearings office and termination of my position. The record is very voluminous, much of it of a very complex nature. I acknowledge that the time available did not permit me to examine and analyze the evidence in such detail as I would have liked. Nevertheless I hope that in the event of appeal the record made is complete and that it will suffice to permit IBLA to render a just and correct final decision.

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No. 94-221

In The

Supreme Court of the United States

October Term, 1994

ROBERT C. DOWNER,

Petitioner,

vs.

ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE

AND

MAXINE V. SWENSON,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION OF RESPONDENTS ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider an evidentiary standard utilized in the State Courts of Nevada in a tort case between Nevada citizens filed and tried in a Nevada State Court under State law.

2. Should this Court grant certiorari to review an evidentiary standard created by the Department of the Interior for resurveys of government lands when the Department of the Interior is not a party to the action below and its evidentiary standards were not utilized by the Nevada Courts in the instant case.

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Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION OF RESPONDENTS ELDON HANNEMAN AND PATRICIA HANNEMAN, HUSBAND AND WIFE

Eldon and Patricia Hanneman (Hanneman) Respondents, respectfully submit this brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of The State of Nevada, dated June 10, 1994 filed herein by Petitioner Robert C. Downer, which Petition was received by Respondents on August 30, 1994.

I

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The matters of which Petitioner complains are two separate and distinct matters and Petitioner fails to distinguish between them. We will discuss Petitioner's involvement in the two proceedings hereinafter.

Petitioner correctly states that in 1965 he was a licensed land surveyor (in Nevada) and was employed to subdivide a portion of land located in a rural area adjacent to Highway 395 in Douglas County, Nevada. Stoddard Jacobsen was the owner of a portion of land in the Northern part of Section 9, Township 11 North, Range 21 East, M.D.B.&M. (A25). Contiguous to the North of Section 9 is Section 4 of the same township and range. The Western portion of Section 4 is trust land held by the Bureau of Indian Affairs and the Eastern portion is owned by the BLM (A29). Downer knew when he began the survey of the adjacent ownerships.

The northern most lot as platted by Downer was shown on his plat as being 5.88 acres of land. Respondents Hanneman acquired ownership of that parcel which was improved with a well and a run down house and garage in 1976 for a purchase price of $35,000.00. (A28).

In 1981 the Hannemans were informed by the attorney for a mining company holding claims on the BLM property in Section 4 that the boundary between Sections 4 and 9 was approximately 200 feet south of the Downer boundary and that the Hanneman property in fact was

1.54 acres which did not include the well, the house or the garage. (A28-29).

Upon receiving that information Hanneman informed Respondent Maxine Swenson who was his seller and she in turn informed Downer. Downer contacted BLM which then conducted a dependent resurvey on the boundary line common to Sections 4 and 9. The results were inconsistent with Downer's survey. The Nevada State Director of BLM dismissed Downer and Jacobsen's protest without a hearing. Downer and Jacobsen appealed the dismissal and Administrative Law Judge Mullen of the Interior Board of Land Appeals set aside the dismissal and ordered a hearing before Administrative Law Judge L.K. Luomo. (A30).

A variety of proceedings before the Interior Board of Land Appeals occurred thereafter and are discussed hereafter.

In the interim, however, the Hannemans filed an action in the Ninth Judicial District Court of the State of Nevada in and for the County of Douglas against Downer, among others. Allegations against Downer included allegations of negligence. (A26). That case was tried in 1991 and resulted in a judgment in favor of Hannemans. That judgment was appealed and was affirmed in part and reversed in part by the Nevada Supreme Court in March of this year. The negligence of Downer was affirmed, and the matter was remanded for an additional assessment of damages. (A23, 24).

This Petition is addressed to the State Court proceedings.

B. PROCEEDINGS BEFORE THE INTERIOR BOARD OF LAND APPEALS

Downer was unsuccessful in his efforts before the Interior Board of Land Appeals and as a result petitioned the U.S. District Court for the District of Nevada for review of the administrative proceedings. The District Court dismissed his application for want of standing. Downer then appealed to the Ninth Circuit which affirmed the District Court. *Downer v. Hodel*, 977 F.2d 588 (1992).

The Ninth Circuit summarized the IBLA proceedings as follows:

> "In 1965, Robert Downer surveyed land owned by STODDARD JACOBSEN, adjoined on the north by land held in trust by the United States for Indians. Downer obtained copies of the original 1881 plat and field notes from the BLM Records Office in Reno, Nevada. In his reconnaissance survey to locate section corners along the north line of section 9, he was unable to locate any authentic corners. Rock piles that were reported by BLM to be the northwest corner and the north quarter corner of the section were determined by Downer to be spurious. See STODDARD JACOBSEN & Robert C. Downer v. Bureau of Land Management, 85 IBLA 335, 339-40 (1985). Each was over 200 feet south of the one-mile distance north of the south section line recorded in the plat and in the notes.
>
> The Government leased the trust land to a mining company, which hired AER, Inc., a private surveying company, to survey the trust land in 1981. The AER survey adopted the rock piles as

markers and placed the boundary between Sections 4 and 9 of Township 11 North, Range 21 East, Mount Diablo Meridian, Nevada, about 200 feet south of Downer's survey line. Jacobsen had sold some of the property in the 3/4-mile long, 200-foot wide strip of approximately 20 acres to third parties. Because of the discrepancy, BLM resurveyed the property in 1982. BLM's resurvey substantially adopted the AER result. Jacobsen and Downer appealed, and the IBLA, finding a substantial question of fact, referred the case to an administrative law judge for hearing. 85 IBLA 335 (1985). That judge remanded the case to the BLM for a resurvey, requiring the BLM to establish beyond a reasonable doubt the accuracy of its placement of the corner shared by sections 4, 5, 8 and 9. 97 IBLA 182 (1987). The BLM moved for reconsideration of the evidentiary standard. The IBLA granted the motion and held that the BLM need only provide substantial evidence to support its resurvey. 103 IBLA 83 (1988). Because substantial evidence supported the 1982 dependent resurvey's placement of the common corner, the IBLA upheld that survey and did not order another survey. Id. A successor in interest to a landowner who had purchased land from Jacobsen sued Jacobsen and Downer in Nevada state court in 1984. Jacobsen cross-claimed against Downer alleging that Downer had surveyed Section 9 improperly. Judgment was entered against Downer in March 1992."

The Secretary of the Interior is charged by Congress with the performance of "all executive duties appertaining to the surveying and sale of public lands", (43 U.S.C., Sec. 2 and see 43 U.S.C., Sec. 52), including the issuance

of patents for public lands. 43 U.S.C., Section 15. The power to make and correct surveys of the public lands belongs exclusively to the Political Department of the Government. *Cragin v. Powell*, 128 U.S. 691 (1888).

The Government's interest was in Section 4 which contained public lands. Since, however, the Government through its prescribed procedures established a boundary line that was approximately 200 ft. south of the Downer survey the Hannemans were necessarily dispossessed of their home.

C. PROCEEDINGS BEFORE THE COURTS OF NEVADA

On March 27, 1992 the Ninth Judicial District Court of the State of Nevada, in and for the County of Douglas, entered a Judgment in favor of Hanneman and against, among others, Downer. (A25-50). On March 30, 1994 the Nevada Supreme Court affirmed liability against Downer and remanded the case to increase an award of damages to Hannemans. That case is reported at 110 Nev. 167, 871 P.2d 279 (Nev. 1994). Petitioner's Appendix for the Nevada Decision (A3) omits the following:

> "Prior to commencing the survey Downer obtained plats, notes and prior surveys from the Bureau of Land Management (BLM). When surveying the property Downer found and rejected the monuments, accessories and corners because they did not comport to the field notes of the original survey and because he believed them to be fraudulent. Thus, Downer relied almost exclusively on the calls and distances in the field

notes and upon plats in determining the northern boundary of Jacobsen's property."

The Trial Court noted "Downer defended his survey by first commenting that the method described by Forsythe would have been financially unworkable in the context of such a small subdivision."

The Trial Court also found:

"3. Downer acted unreasonably, and he negligently performed the survey he recorded in 1966.

a. Downer's behavior on the stand was deliberately evasive and non-responsive to the questions asked of him, and, as a result, he was not a credible witness. It is abundantly clear from the evidence presented that Downer failed to act reasonably when performing his survey in 1965, and that his actions since that time have been singularly designed to shore up his position after the fact. Plaintiff's Exhibit D is the most graphic illustration of Downer's failure to meet the standard of care. *Every one* of his own surveys since 1965 differs from the previous one, and *every one* of his surveys establishes boundaries in Section 9 which are different from the BLM survey." (A48).

The Trial Court also noted:

"On cross, Downer admitted that he also never located, in 1965, the northeast corner of Section 9, but that he established the northern boundary of Section 9 anyway. He also admitted that he never found a monument along the chop line which he believes marks the section line. Downer reiterated that the only monument he

physically located in 1965 was the southeast corner of Section 9." (A44).

The critical corner of the survey in question was the northwest corner of Section 9 which is also the southwest corner of Section 4. At that corner BLM found a trachyte stone measuring 22x17x9 with markings. In addition, four uprooted blazed bearing trees were found, two of which were age dated to 1881, the year of the original survey. Downer rejected the monument and accessories and testified the markings on the stone looked fresh to him and suggested the trees had been moved to the area. (A280). Neither IBLA nor the Nevada Courts found Downer's explanation to be reasonable.

The law in Nevada is well settled that in determining boundaries monuments control irrespective of field notes and irrespective of testimony of witnesses. *Backer v. Gowen*, 73 Nev. 34, 307 P.2d 765 (1957). The Nevada Supreme Court relied upon this case below.

The law is also well settled in Nevada:

> "In a negligence action, the plaintiff has the burden of demonstrating the following: (1) that the defendant had a duty to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3) that the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the plaintiff was damaged." *Joynt v. California Hotel & Casino*, 108 Nev. 539, 835 P.2d 799 (1992).

Nevada also recognizes:

> "The mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Negligence

is never presumed but must be established by substantial evidence." *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 370 P.2d 682 (1962).

This case was tried in Nevada in accordance with Nevada law and the Trial Court found substantial evidence of negligence. The Supreme Court in reviewing the evidence presented at trial agreed substantial evidence was presented.

II

CONCLUSION

The Petition in this matter asks for a Writ of Certiorari to the Supreme Court of the State of Nevada. The case was filed in the Nevada State Court alleging negligence under State law, was tried in State Court under State evidentiary standards. Petitioner was found negligent and that negligence was affirmed on appeal. Simply because an event occurred which caused damages to the Hannemans was not of itself sufficient to predicate liability. It was necessary for the Hannemans to satisfy the Nevada Courts that Defendant had the duty to exercise due care and that he breached its duty. When he postulated the scribed monument had recent markings and concluded that in 1881 the bearing trees had been dragged to their location he was reasonably found to be unreasonable and therefore negligent and therefore liable.

There are no issues in this case of due process of law and this case does not create or involve conflicts in Federal laws or standards. No Federal agencies are before

this Court. No Federal question was in issue or decided in the Nevada Courts. The Petition should be denied.

RESPECTFULLY SUBMITTED this 22nd day of September, 1994.

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